88-976

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

—o—

VINCENT JAMES LANDANO,

Petitioner,

—vs—

JOHN J. RAFFERTY, SUPERINTENDENT OF RAHWAY STATE PRISON AND THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

NEIL MULLIN, ESQ.
(Counsel of Record)
SMITH, MULLIN & KIERNAN, P.C.
100 Executive Drive
Suite 340
West Orange, New Jersey 07052
(201) 736-7033

ERIC NEISSER, ESQ.
American Civil Liberties
Union of New Jersey
2 Washington Place
Newark, New Jersey 07102
(201) 642-2086

JOHN A. POWELL, ESQ.
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether a state hearing is "full, fair and adequate," 28 U.S.C. 2254(d), when the state court *presumes* untrustworthy an identification witness who voluntarily comes forward to disclose improperly suggestive police tactics, the court explicitly refuses to entertain any federal constitutional claims, the court denies petitioner vital, exculpatory discovery, and the court permits the prosecutor to harangue the witness about the risks of perjury.

2. Whether a district court that holds an evidentiary hearing in a habeas matter because of new evidence discovered during the pendency of that matter must disregard its own findings in deference to state court findings where the new evidence enhances the credibility of a material witness alleging substantial violations of federal constitutional rights.

3. Whether proof of a pattern of egregious prosecutorial misconduct including the admitted coercion of a key witness ought to shift the burden of persuasion to the state to show that such conduct had a harmless effect upon the outcome of a criminal proceeding.

4. Whether *United States v. Agurs* requires, in determining materiality, that suppressed exculpatory evidence with respect to each of three key eyewitnesses be evaluated as an aggregate, in the context of the entire record, rather than piecemeal.

5. Whether a supplemental jury charge violates the Sixth Amendment of the United States Constitution when it conveys that jurors in the minority will *inevitably* waste the state's time and money by forcing a retrial.

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The opinion of the Court of Appeals of the Third Circuit in this matter appearing at App. 1 to 15 is published as *Landano v. Rafferty, et al.*, 856 F.2d 569 (3rd Cir. 1988).

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JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254 in that on September 9, 1988, the Court of Appeals entered judgment in this case affirming a judgment of a United States District Court denying issuance of a writ of habeas corpus. This is a civil matter that may be reviewed by writ of certiorari.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

SIXTH AMENDMENT
UNITED STATES CONSTITUTION

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed by the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and* to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, SEC. ONE, UNITED STATES CONSTITUTION

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. SEC. 2254 (d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

———o———

STATEMENT OF THE CASE

This is a petition for certiorari seeking review of the Third Circuit's affirmance of a denial below of petitioner's application for a writ of *habeas corpus*. The District Court found, in this case, that the state knowingly suppressed exculpatory evidence, engaged in coercion of a witness, and used improper techniques to secure identification testimony, but that Court denied the writ because the Court perceived itself bound, pursuant to 28 U.S.C. Sec. 2254(d), by adverse rulings of a state post-conviction court.

In so ruling, the Court opined that it "fears that a great injustice has occurred and *respectfully invites reversal of its decision*". (App. 18) (emphasis supplied). The Court found that in this case "there is a risk that an innocent person has been convicted of . . . a . . . crime". (App. 16) "No decision of this court" the court wrote "has ever been made with greater reluctance. . . . Upholding deference to state factual findings in this matter is a bitter exercise of judicial restraint, since it may result in a gross injustice." (App. 61)

A. Procedural History

On May 17, 1977, Vincent James Landano was convicted of murder and other crimes arising out of an armed robbery. He was sentenced to life imprisonment for the murder, and a seven to fifteen year term, consecutive to the life term, for the other offenses. A co-defendant,

Allen Roller, who testified against Mr. Landano, entered a plea of *non vult* to a felony murder charge arising out of the armed robbery and received a sentence of thirty years imprisonment. (App. 19)

Petitioner appealed his conviction to the New Jersey Appellate Division. During the pendency of that appeal, in November of 1978, the state trial court conducted evidentiary hearings with respect to newly discovered exculpatory evidence and denied petitioner relief. (App. 20)

On March 21, 1980, the New Jersey Appellate Division affirmed both the judgment of conviction and the trial court's denial of post-conviction relief.

On July 8, 1980 the Supreme Court of New Jersey denied certification. See *State v. Landano*, 85 N.J. 98 (1980).

On March 31, 1982 petitioner filed a second petition for post-conviction relief in the state court. The petitioner alleged, *inter alia,* newly discovered evidence of prosecutorial misconduct. The Honorable Joseph P. Hanrahan, J.S.C. (not the original trial judge) held limited evidentiary hearings and on January 4, 1983 denied relief. (App. 20)

The New Jersey Appellate Division affirmed the denial of relief on January 30, 1984 and on June 13, 1984 the Supreme Court of New Jersey denied certification. (App. 20)

On October 10, 1985, the petitioner filed a *habeas corpus* petition in the United States District Court, District of New Jersey, in Newark, New Jersey. (App. 21)

On September 29, 1987, the District Court, following an evidentiary hearing, denied relief to the petitioner but determined that "there is probable and significant cause for appeal." See Opinion and Order at App. 16 to 63.

On December 22, 1987, the District Court denied a motion for reconsideration. See Opinion and Order at App. 64 to 72.

On September 9, 1988, the United States Court of Appeals for the Third Circuit affirmed the order of the District Court. (See Opinion and Order at App. 1 to 15)

B. Statement Of Facts

General Background

On August 13, 1976, during the course of an armed robbery of a check cashing facility in Kearny, New Jersey, a perpetrator fatally shot Newark Police Officer John Snow. (App. 22 to 23).

The check cashing facility operated out of a trailer situated on a parking lot in an industrial area. On the morning of the crime, a car pulled into the parking lot and two men emerged. Allen Roller, a confessed participant in the armed robbery, approached the trailer, forced entry, robbed the occupants at gun point, and retreated to the car. (App. 22 to 23)

While Roller, who had a red beard on the day of the crime, robbed the trailer, a dark-haired perpetrator held up a customer seated in a van near the trailer. During the course of that robbery, Newark Police Officer John

Snow pulled up in a police car and parked, apparently unaware of the on-going robberies, behind the van. As a favor to the owner of the check cashing facility, Snow was delivering $46,000.00 in cash. (App. 22 to 23)

Only one individual witnessed what next transpired. Joseph Pascuitti stood on a loading deck of a warehouse a short distance from the police car. Pascuitti saw a white male with closely cropped curly hair and no moustache standing near the driver's side of the police car. He saw the curly-haired perpetrator raise a gun over his head and lower it to the level of the police car's driver. Pascuitti heard the gun fire, turned away and then saw the getaway car speed by, the dark-haired perpetrator driving. (App. 23 and 25)

On the day of the crime, some hours thereafter, the petitioner was photographed as he cashed a check at an unrelated check cashing facility in Staten Island, New York. The photo shows Mr. Landano with long, straight black hair and a prominent, bushy mustache. (App. 25, Trial Exhibit D-13)

Victor Forni, an associate of Allen Roller in a motorcycle gang called "The Breed", closely matched, in physical appearance, the description of the killer offered by Pascuitti. The gun used to kill Snow was Victor Forni's gun. (App. 51 to 52; App. 22)

The prosecutor, Thomas Mulcahy, tried to extradite Forni from New York City, where he was captured and held shortly after the crime, but Forni successfully delayed extradition. After failing to extradite Forni, the prosecutor turned his efforts to extraditing the petitioner, Mr.

Landano. (Mulcahy Lecture Transcript at 51 to 53, see also, App. 57)

Mr. Landano had been identified by Roller after Roller was apprehended in Denver, Colorado attempting to flee. In a lecture prosecutor Mulcahy gave in July of 1981, tape recorded and transcribed for petitioner, (See App. 53 and 57) Mulcahy, speaking figuratively, bragged that "somewhere on route between Denver and Newark Airport . . . they [federal and state authorities] h[u]ng Roller out of the plane" and Roller named Landano as the killer of Snow. (Mulcahy Lecture Transcript, 40:6-41:20)

The prosecutor, who described himself as being under "pressure" to get a conviction because the case involved the killing of a police officer (Mulcahy Transcript at 8), decided to follow the lead of Roller by targeting Landano as the killer of Officer Snow. Landano was more easily extradited than Forni because in the words of the prosecutor, his attorney at the time, was "incompetent", "an idiot." (Mulcahy Transcript 50:2, 11) Moreover, the state's extradition of Landano was facilitated with an affidavit altered by the state to make it appear that petitioner had been identified by an eyewitness on the very day of the crime. (Trial Transcript, IIIT, A51:7 to A52:25).

Evidence suppressed by the State, but uncovered after the trial, reveals that in order to create a case against Landano, the prosecutor engaged in coercive, deceptive and suggestive measures with respect to eyewitnesses.

The Coercion Of Jacob Roth As Found By The District Court Below[1]

Jacob Roth was the owner of the Kearny check cashing facility robbed in this matter. At the time of the crime, his college aged son, Jonathan Roth, and a customer, John DeMaritz, were inside the trailer. (Trial Transcript, VIT at 15 *et seq.*, VIIIT at 3 *et seq.;* VIIIT at 58 *et seq.*)

The trailer had a window, through which business was transacted and a door with a small window. Three eyewitnesses testified that Roller, and he alone, approached the business window of the trailer while Jacob Roth sat at that window. Failing to force his gun under the window, Roller broke the small door window and entered the trailer while its three occupants lay face down on the floor. (Trial Transcript, VIT at 16 to 17; VIIIT at 13; XT at 62 to 63)

At trial Jacob Roth, in contradiction with the other relevant witnesses, claimed that the dark-haired perpetrator, not Roller, had approached the business window with a gun. (App. 54)

Roth claimed that on the basis of Landano's approach to the business window he was able "positively" to identify Landano as the dark-haired perpetrator. (App. 54)

At trial, it was revealed that on August 26, 1976 Roth had not been able to make a positive photographic identification of Landano, but somehow on August 31, 1976 he was able positively to select Landano's photograph from an array. (App. 55)

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[1]See App. 52 to 58.

In his 1981 lecture, prosecutor Mulcahy revealed, for the first time that Jacob Roth "was a somewhat uncooperative guy who never wanted to be—didn't want to be bothered". According to Mulcahy, Roth "just didn't want to be involved and *we had to like coerce him*—tell him—you're involved—this is your place—it got ripped off." (Emphasis supplied) (App. 54)

The mechanism for the "coercion" of Jacob Roth, suppressed by the prosecutor but revealed in post-conviction proceedings below, was as follows:

Jacob Roth had dealings with underworld figure, Anthony Gallagher, a notorious Bayonne loan shark. Check cashiers are forbidden from consorting with such criminal figures. N.J.S.A. 17:15A-12. Moreover, Jacob Roth was suspected of illegally paying gratuities to Officer Snow in exchange for his money delivery services. In his lecture, prosecutor Mulcahy admitted that during the investigation of the Snow murder he had "looked hard" into Roth's dealings with Gallagher and possible loan sharking and that he had subjected Roth to "numerous interviews" probing these matters. Days after Landano was sentenced, Jacob Roth surrendered his check cashing license. (App. 52 *et seq.*)

None of the foregoing was revealed before conviction of Mr. Landano. At trial, the prosecutor went to great lengths to stress to the jury that "throughout this case there is no suggestion of police malpractice or *coercion*" with respect to Jacob Roth. (Emphasis supplied) (App. 55)

The District Court below found that the State engaged in "knowing suppression of its investigation" (App. 56) into Roth that "cannot be excused," *ibid.*

Suppression Of Impeachment And Bias Evidence With Respect To Allen Roller As Found By The District Court Below[2]

At trial Allen Roller claimed that Landano admitted killing Officer Snow as they sped away in the getaway car. Roller admitted entering into a plea bargaining arrangement that disposed of the Kearny robbery and one other armed robbery of "Mike's Bar" in Jersey City. Finally, Roller denied Forni's active participation in the subject crime, relegating him to a planning role, and denied that Forni ever participated actively with Roller in armed robberies. (App. 48)

Evidence, suppressed by the State but discovered after trial, revealed that:

> (1) Forni had been identified as an *active* participant in two armed robberies undertaken by Roller in Perth Amboy, New Jersey;
>
> (2) The Prosecutor's office told Perth Amboy authorities not to publicize their investigation into Roller's Perth Amboy robberies "in order not to jeopardize any potential plea bargain" with Roller.
>
> (3) Roller was positively identified as a participant in the Perth Amboy crimes by a detective in the Perth Amboy Police Department.

(App. 48 to 49)

The District Court below found that "At trial Roller denied having participated in criminal activity with Forni. Presentation of the Perth Amboy evidence would challenge Roller's credibility on this issue and create a power-

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[2]See App. 46 to 52

ful suggestion that Roller was lying to protect Forni." (App. 52)

Suppression Of Evidence With Respect To Raymond Portas As Found By The District Court Below[3]

Raymond Portas was a truck driver who observed the getaway car maneuver around his truck as the car fled the crime scene. On the night of the crime, Portas misidentified the back seat occupant of the car selecting the photograph of one William Applegate, a completely innocent person, instead of Allen Roller, from an array. (App. 26)

In his initial statement to the police, Portas described the driver of the getaway car as blond, and having no moustache. (App. 24 n.2; Trial Transcript, 4/25/77 at 52:19 to 53:15) At trial, Portas testified that eight months after the crime he selected petitioner's photograph from an array displayed in the prosecutor's office. Also, Portas purported to make an in-court identification of the petitioner. (App. 27)

Both the District Court below and the state post-conviction court have found that within a day or two of his trial testimony, Portas went to his priest as a result of uneasiness concerning his trial testimony. (App. 30; 74). The priest assured Portas that the police and prosecutor "know what they are doing". Portas let the matter rest. (App. 30)

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[3]See App. 24 to 46

Some time in October of 1981, Portas read a magazine article about this case, and contacted the prosecutor's office about improprieties in procedures used to secure his testimony. The prosecutor told Portas "they didn't think it mattered", (App. 30 n.4 and text) so Portas contacted Petitioner's counsel (ibid.).

Portas officially came forward first in a state post-conviction hearing and later in a federal evidentiary hearing, and revealed that his testimony had been the product of coaching and a suggestive photographic display procedure. He testified that in fact he had no idea who drove the getaway car. (App. 28 to 29; 37)

Specifically, Portas claimed that on April 15, 1977, when he was called down to the prosecutor's office eight months after the crime, he was shown a photographic array of dark-haired perpetrators. He immediately selected a photograph that he thought depicted the driver (who was also the killer of Snow). A detective took that photograph out of the room and Portas never saw it again. The State has never revealed Portas' initial selection. (App. 37)

Only after further conversation with a detective during which the detective said, "That's the man we want" (App. 28) did Portas "select" Mr. Landano's photograph. When asked to point Mr. Landano out at a pre-trial *Wade* hearing, Portas, pointing to Landano, said "that's him, ain't it?" (Trial Transcript 4/25/77 at 54:16-18) Portas later revealed that just prior to his trial testimony, he saw Mr. Landano who he did not recognize, and another man walk by in the hallway of the courthouse. Portas went to the men's room. A detective followed him in and he

identified Mr. Landano to Portas. Portas relied upon the detective's comments in making his in-court identification of Mr. Landano. (App. 29, 35 to 37)

At the evidentiary hearing below, both in federal and state court, Portas' claim that his initial photographic selection had been spirited away was strongly corroborated by the fact that two photographs in the array he saw were missing. Ten years after the trial, the State complying with a federal discovery order that had been denied by the State Court, purported to find the missing photographs in an envelope containing another set of photographs that Portas was never shown. (App. 37)

The District Court below, having heard Portas' testimony found him credible in all respects. (App. 35) That Court, found that Portas "lacked any 'independent recollection' of the petitioner" as the driver of the vehicle on August 13, 1976. (App. 37) The District Court found Portas' pretrial and in-court identifications of Landano to be "suspect" (App. 37).

In finding Portas credible, the Court found his testimony corroborated by documentary and other evidence produced during discovery in the federal court. (App. 37)

Finally the District Court below found that in the state court hearing with respect to Portas that resulted in an adverse outcome for petitioner (App. 73 to 78), the state court had allowed the prosecutor to harangue Mr. Portas during his testimony. The District Court found "in reading the transcript of the state court hearing one could reasonably conclude that the witness had become the criminal. The examination was not a search for the truth

but rather an exercise in harassment and intimidation in an effort to dissuade the witness from any recantation." App. 32 to 33).

Moreover, the District Court found that the state court "failed to make specific findings as to Portas' inability to identify Landano from the [photographic] array of dark-haired perpetrators . . ." [App. 34]

Nevertheless, the District Court concluded that 28 U.S.C. 2254 (d) required that it abandon its own findings and enter judgment against the petitioner. Accordingly, petitioner was denied a writ of habeas corpus.

The Trial Court's Coercive Charge

The State's case was so weak that after two days of deliberation and an intervening weekend, the jury emerged unequivocally hung. It handed the trial judge the following note:

> Your honor, we honestly feel we cannot get a twelve vote count on guilty or not guilty. We tried on all eight counts. We can't say twelve to zero guilty or not guilty. What should we do? (Trial Transcript, XXIT at 2)

The trial court, instead of accepting the jury's hung verdict, sent them back for deliberations with a supplemental charge that *inter alia*, stressed the economic cost of the trial:

> "Ladies and gentlemen, we are in the fifth week of this trial. And I think you realize what is invested

> as far as time, money and everything else. (Trial Transcript XXIT at 2)

Elsewhere in its supplemental charge, the Court misrepresented the prospect of retrial, characterizing it as a certainty, and ruled out the prospect of newly discovered evidence:

> You should consider also, and I'd like you to pay close attention to this, that this case at a future time must be decided; that you're selected in the same manner and from the same source from which any future jury must be selected. There's no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it; or that more or clearer evidence will ever be produced on one side or the other.
>
> "Having said that, and saying it forcefully to you, ladies and gentlemen, I ask you to retire once again to the jury room and invest more time in the case and see what you come up with, please. Thank you." (Trial Transcript XXIT 2:4 to 4:20)

Fifty-three minutes after the foregoing charge, the jury returned a verdict of guilty on all eight counts. (Trial Transcript XXIT at 4 *et seq.*)

State Post-Conviction Proceedings

During the direct appeal from petitioner's conviction, the matter was remanded to the state trial court for a hearing concerning newly discovered evidence concerning the previously unrevealed Perth Amboy crimes committed by Roller and Forni. The trial court found the evi-

dence exculpatory but not material, since the conviction was supported by the testimony of other witnesses such as Jacob Roth and Raymond Portas; exculpatory evidence with respect to Roth and Portas was discovered in 1981 (see discussion above). (App. 48 to 50)

After exhaustion of his direct appeal, petitioner again sought post-conviction relief in a state trial court. He relied upon newly discovered exculpatory evidence with respect to the coercion of Roth and the suggestive identification procedures used to secure Portas' identification procedure. (App. 20)

The state court refused to grant an evidentiary hearing with respect to the Roth issue. (Order of State Court, September 27, 1982) The state court granted a hearing with respect to the Portas issue, but denied petitioner discovery of the state's investigative file as it pertained to Portas. (*Ibid.*)

During the hearing with respect to the Portas issue, the state court indicated that it was unwilling even to entertain federal constitutional issues [e.g., whether Portas' initial photographic selection of someone other than Landano was suppressed in violation of *Brady v. Maryland,* 373 U.S. 83 (1963)] and rather would determine only whether Portas' testimony amounted to a recantation under state law. (See App. 73 *et seq.*) When petitioner's counsel sought to ask questions about prosecutorial misconduct, the following colloquy occurred:

> The Court: Hold it, Mr. Mullin. We're here now on an Evidentiary Hearing and recanting witness. We're not here to lay a foundation for any [prosecutorial] misconduct in office or practice.

> Mr. Mullin: Well, we're here on recantation and also the suppression of evidence by the prosecutor as to the influence of that witness by an officer of the prosecutor's office, a detective . . . we have a *Brady* issue . . .
>
> The Court: *I don't see a Brady issue.* This is strictly an Evidentiary Hearing (with respect to recantation)

[Habeas Petition, *Exhibit C,* Transcript of 10/28/82 at 107:10 to 24.] [Emphasis supplied.]

Indeed, in its opinion denying post-conviction relief the state court did not resolve any federal constitutional issues, but determined only that Portas' testimony did not rise to the level of a recantation. (See App. 73 *et. seq.*)

In so ruling, the state court declared that it was bound by state law to presume that Portas' testimony was "suspect and untrustworthy." (App. 78) The court indicated that in evaluating Portas' testimony, his "power of recall was not the test" (ibid.) i.e., of little significance. The court concluded that Portas did not offer a classic recantation, he did not say "I lied before" (App. 77) and therefore the court denied relief.

Of course, Portas never contended that he lied at trial. He contended that his testimony at trial was the product of suggestive police techniques that he realized were improper immediately after the trial.

The Federal Evidentiary Hearing

After exhausting his appeals from the second state denial of post-conviction relief, the petitioner filed a petition for habeas corpus in the United States District Court, District of New Jersey. (App. 21)

The District court ordered the discovery that the state court had denied and because some evidence thereby revealed tended to corroborate Portas, the District Court held an evidentiary hearing at which Portas testified. (App. 33, 37)

The District Court ordered the discovery that the concluded that Portas' testimony provided an adequate basis for issuing a writ of habeas corpus. The court declined to issue the writ however because it felt bound by 28 U.S.C. 2254 (d) to defer to the adverse finding of the second state hearing with respect to Portas.

The Affirmance by the Court of Appeals for the Third Circuit

On September 9, 1988, the Third Circuit Court of Appeals affirmed the denial of habeas relief. That Court's summary of the facts varied widely from the facts as found by the District Court. Nothing was said, for example, about the prosecutor's admission that he "coerced" Roth. Moreover, the Circuit Court chose not to address serious issues raised in petitioner's brief about the inadequacy of the state court hearing. (See App. 1 to 15).

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REASONS FOR GRANTING THE PETITION

POINT I

THE STATE COURT HEARING IN THIS MATTER WAS NOT "FULL, FAIR & ADEQUATE," 28 U.S.C. § 2254(d), BECAUSE THAT COURT PRESUMED UNTRUSTWORTHY PETITIONER'S CHIEF WITNESS, REFUSED TO ENTERTAIN FEDERAL CLAIMS, DENIED VITAL DISCOVERY, AND PERMITTED THE PROSECUTOR TO HARANGUE THE WITNESS.

This case raises important questions about the adequacy of a state court post-conviction hearing that this Court has not previously addressed. In *Sumner v. Mata*, 449 U.S. 539 (1981), this Court observed that "Since the 1966 amendment [to the 1867 habeas corpus statute], this Court has had few opportunities to address the various provisions of subsection 28 U.S.C. § 2254(d) . . .," *id.* at 550.

This case provides this Court with an appropriate factual setting for delineating when a state court hearing is inadequate under 28 U.S.C. § 2254(d) because this case, unlike others touching upon that issue, involves glaring deficiencies in the state court decisional process.

Here, as discussed below, the state court expressly refused to entertain petitioner's federal constitutional claims and then failed to provide the "plenary consideration" of federal claims found to exist in *Sumner*, *supra*, at 546. Moreover, the state court here used an improper legal standard, discussed below, unlike the state court in *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1971). The courts below grossly misinterpreted the state court proceeding in this matter and concluded that the state court impliedly found Portas incredible with respect to all issues. But

this case has no such implied finding and thus is distinguishable from *Marshall v. Lonberger*, 459 U.S. 422 (1983). This case, unlike *Sumner*, *LaVallee* and *Marshall*, *supra*, involves a clearly inadequate state hearing.

Raymond Portas' testimony in the state court post-conviction proceeding raised two types of federal constitutional issues: (1) issues under *Simmons v. United States*, 390 U.S. 377 (1968) because Portas claimed his identification (in-court and out-of-court) of Landano was the result of suggestive procedures and (2) issues under *Brady v. Maryland*, 373 U.S. 83 (1963) because the prosecutor concealed Portas' initial photographic selection of someone other than Landano, and concealed the suggestive techniques used to secure Portas' testimony.

When counsel tried to explore these issues, the court interrupted and said that "I don't see a *Brady* issue." In its opinion (App. 73 to 78) the state court made no findings or conclusions with respect to the foregoing federal issues. Rather it treated petitioner's claims only under state recantation law.

Under that body of law, as distinguished from relevant federal law, a recanting witness is *presumed* suspect and untrustworthy. *State v. Carter*, 69 N.J. 420, 427 (1976); *State v. Baldwin*, 47 N.J. 379, *cert. den.* 385 U.S. 980 (1966).

Moreover a recantation does not justify a new trial unless, as the state judge noted, the recanting witness is willing to say "I lied" at trial. (App. 77) In short, a recantation must amount to "a confession of perjury." *State v. Vaszorich*, 13 N.J. 99, 130 (1953).

The failure of Portas to offer a credible recantation did not imply, as the District Court below presumed, that

his testimony with respect to the *Brady* and *Simmons* issues was incredible. It simply meant that Portas did not credibly confess perjury, *Vaszorich, supra*, with respect to his trial testimony. But Portas did *not* perjure himself at trial. His testimony, he realized shortly after trial, was the product of suggestive techniques. He did not intentionally lie when he identified Landano.

The District Court below thought itself bound by the state court finding that Portas' recantation was not viable and equated that finding with a general finding that Portas was incredible, relying upon *Marshall v. Lonberger*, 459 U.S. 422 (1983). In *Marshall*, however, the state court did not presume the witness untrustworthy, did not require a confession of perjury, and willingly entertained the federal constitutional issue.

POINT II

WHERE A DISTRICT COURT DETERMINES TO HOLD AN EVIDENTIARY HEARING IN A HABEAS CORPUS MATTER BECAUSE OF EVIDENCE NEWLY DISCOVERD DURING PENDENCY OF THE FEDERAL PETITION, IT IS NOT CONCLUSIVELY BOUND BY FACTUAL FINDINGS OF A STATE COURT WHERE THE NEWLY DISCOVERED EVIDENCE ENHANCES THE CREDIBILITY OF A MATERIAL WITNESS ALLEGING SUBSTANTIAL FEDERAL CONSTITUTIONAL VIOLATIONS.

This case poses a novel question concerning the interplay of 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963), where evidence, newly discovered during the pendency of a federal habeas action, corroborates a material witness who alleges substantial violations of federal constitutional rights. Even if this Court were to conclude that the state hearing in this matter is "full,

fair and adequate", 28 U.S.C. § 2254(d), nevertheless it does not follow that the District Court below was conclusively bound by the state court's adverse factual findings. Indeed, that Act provides that there is only a *rebuttable*, not conclusive, presumption that state findings are correct. Specifically the act provides, in pertinent part, that:

> . . . in an evidentiary hearing in the Federal Court . . . unless the [hearing is inadequate pursuant to 28 U.S.C. § 2254 (d) (1) -(8)] . . . the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous.

28 U.S.C. § 2254(d)

Here, new evidence, strongly corroborating a material witness, was discovered during the pendency of the federal action. Because of that discovery, the district court, pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), decided to hold an evidentiary hearing. At the hearing, the newly discovered evidence corroborated the material witness, Raymond Portas, and enhanced his credibility (See App. 34 n.5 and text; App. 35 n.7 and text; App. 37 to 38 n.8 and text).

Indeed the district court found Portas credible and his revelations material to the issue of guilt and innocence but nonetheless deemed itself *conclusively* bound by 28 U.S.C. § 2254(d) to abandon its own findings and adopt those of the state court.[4]

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[4] The District Court reasoned that " . . . it is difficult to imagine the grounds upon which a [state court] credibility determination can *ever* be considered 'erroneous'." (Emphasis supplied) (App. 43). Surely, when newly discovered evidence corroborates a witness that the state court *presumed* to be incredible, as here, the state court credibility determination is "erroneous," 28 U.S.C. § 2254(d).

This case clearly poses the question, never previously addressed by this Court, of when, in a *Townsend* new evidence setting, a district court is bound by state court findings and how a petitioner may establish "by convincing evidence" that the factual determination by the state court was erroneous, 28 U.S.C. § 2254(d).

POINT III

WHERE PROSECUTORIAL MISCONDUCT IS EGREGIOUS, AS HERE, THE BURDEN SHOULD SHIFT TO THE STATE TO SHOW HARMLESSNESS BEYOND A REASONABLE DOUBT.

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court held that suppressed exculpatory evidence shall be deemed material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *id.* at 682. This Court apparently intended that *all* suppressed exculpatory evidence be subject to that standard of materiality, even if the suppressed evidence reveals prosecutorial subornation of perjury. See *id.*, 473 U.S. 679 n.9 and text.

The focus of *Bagley, supra,* was not on the nature of the specific prosecutorial misconduct alleged, but rather on whether different materiality standards ought to be used depending on the specificity or lack of specificity of defense counsel's request for discovery. See *United States v. Argus*, 427 U.S. 97 (1976).

We respectfully invite this Court to modify and clarify *Bagley* to require that where suppressed evidence reveals a pattern of prosecutorial misconduct so egregrious as to

violate our "concept of ordered liberty," *Napue v. Illinois*, 360 U.S. 264 (1959), then the burden of persuasion shifts to the State to demonstrate that the prosecutorial misconduct had an impact upon the trial that was "harmless beyond any doubt," *Chapman v. California*, 386 U.S. 18 (1967).

Such a rule would deter the kind of coercion and deception involved here, while preserving to the state an opportunity to demonstrate harmless error.

Surely, there must be some line between the suppression of evidence that grows out of innocent prosecutorial overzealousness, on the one hand, and the kind of prosecutorial behavior that is appropriate only in a totalitarian or police state. Here, the prosecutor admits that he had to "coerce" Jacob Roth by "looking hard" into his underworld connections and in "repeated interviews" he questioned Roth about illegal dealings with the murdered Officer Snow. Somehow magically Roth then saw Landano through a window at which Landano never appeared.

The prosecutor sat silently while Allen Roller denied that his plea bargain embraced crimes other than the Kearny and Jersey City robberies knowing full well that his office told Perth Amboy authorities to keep quiet about Roller and Forni's two armed robberies there because the prosecutor wanted to use those robberies "for plea bargaining purposes."

If there was any doubt about the nature of the prosecutor's methods in obtaining Roller's testimony, his albeit metaphoric reference to "hanging Roller out of an air-

plane" suggests the pressures that led Roller to name Landano.[5]

Eight months after the crime the prosecutor invited Portas to his offices. Somehow Portas, who had described the driver as a blond with no facial hair, emerged from that office as a witness against the dark-haired, moustached Landano. The Portas photographic array was tampered with and Portas was coached going into the courtroom.

Prosecutorial coercion, deception, fabrication of testimony, alteration of evidence—surely such behavior falls outside the rules of our society.

POINT IV

THE COURT BELOW FAILED TO ANALYZE "MATERIALITY" IN THE CONTEXT OF THE ENTIRE RECORD.

In *United States v. Agurs*, 427 U.S. 97 (1976), this Court held that materiality of suppressed evidence "must be evaluated in the context of the entire record," *id.* at 112.

Here, both the District Court and the Court of Appeals below did not follow that requirement.

The Court of Appeals, for example, conceded that the question of materiality with respect to Allen Roller was "somewhat clos[e]", but ruled against petitioner without

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[5] Landano had no relationship to Roller's gang, the Breed. (App. 22) Forni was associated with the Breed. (*ibid.*) Roller had good reason to conceal Forni's role by naming Landano. The Breed had an "enforcement system" to prevent "ratting" (Trial Transcript, XT at 119:14-29).

considering the impact that evidence would have had upon a jury when taken *together* with exculpatory evidence in connection with Jacob Roth. Likewise, the Court below evaluated piecemeal the possible impact upon a jury of the Jacob Roth materials, without adding in the weight of the Roller materials. [See App. 1 to 15]

Had a jury heard of the prosecutor's effort *both* to coerce Roth and to conceal Forni's role in crimes with Roller, it would have found the state's entire case to be of questionable integrity.

Moreover, in *Agurs, supra,* this Court ruled that if the verdict is already of questionable validity, additional evidence of relatively "minor importance might be sufficient to create a reasonable doubt," *id.* at 113.

Here, the verdict was of "questionable validity" *Agurs, supra.* After two days of deliberation and an interviewing weekend, the jury submitted a note indicating that it "honestly felt" it could not reach a unanimous verdict. A verdict was reached only after a coercive charge.

Under these circumstances virtually any evidence, even of relatively "minor importance", *Agurs, supra,* would have tipped the balance in defendant's favor. Ironically, the very Circuit that affirmed below has recognized the relevance to the materiality issue of a jury's difficulty in reaching a verdict. In *United States ex rel Thomas v. State of New Jersey,* 472 F.2d 735 (3rd Cir. 1973) that court ruled that the fact that an *Allen* charge had to be given strengthened a habeas petitioner's claim that evidence was material to the issue of guilt or innocence, *id.* at 737.

This Court should rule that given the totality of circumstances, the suppressed evidence with respect to Roller and Roth is material under *Bagley* and *Agurs, supra.* The matter should be remanded to the District Court with an order that it issue a writ of habeas corpus. In the alternative, this matter should be summarily reversed and remanded to the Third Circuit Court of Appeals with an instruction to reconsider this matter in light of *Agurs, supra,* and the Third Circuit's own ruling in *United States ex rel. Thomas, supra.*

POINT V

A WRIT OF HABEAS CORPUS SHOULD ISSUE WHERE, AS HERE, THE COURT INVADES THE PROVINCE OF THE JURY BY DISREGARDING ITS VERDICT AND ISSUING A COERCIVE SUPPLEMENTAL CHARGE, ALL IN VIOLATION OF THE SIXTH AMENDMENT.

Under New Jersey law, a criminal defendant may not be convicted except by the unanimous decision of a twelve member jury. *State v. Reynolds,* 41 N.J. 163, 187 (1963); *State v. Cordasco,* 2 N.J. 189, 202 (1949); See also, *State v. Trent,* 79 N.J. 251 (1979).

While the Sixth Amendment of the United States Constitution may not compel states to require unanimous verdicts where petit juries consist of twelve persons, *Apodaca v Oregon,* 406 U.S. 404 (1972), *Johnson v. Louisiana,* 406 U.S. 356 (1972), *Burch v. Louisiana,* 441 U.S. 131, 138 n.11 (1979), clearly, where state law mandates such unanimity, a state court may not, consistently with the Sixth Amendment as applied to the states through the Fourteenth Amendment, deprive a defendant of that entitlement.

It is inevitable in a system that requires unanimity that there are three possible outcomes in a criminal trial: conviction, acquittal or no verdict. Under such a system, if a jury cannot reach unanimity, then, the defendant is entitled to a mistrial. The state, in turn, is entitled to retry the defendant.

Here, defendant's right to the no-verdict outcome was violated. The jury unambiguously expressed that outcome by handing the judge a note reading:

> We honestly feel we cannot get a twelve vote count on guilty or not guilt. We tried on all eight counts. We can't say twelve to zero guilty or not guilty.

[Statement of Facts at 15]

Instead of accepting the jury's unambiguous verdict, the state court gave a charge that commissioned the jury to consider matters extraneous to the case, e.g., the "time and expense" involved in Mr. Landano's trial, the inevitibility of retrial, and the fact that no new evidence would ever be uncovered clarifying Landano's culpability.

Of course it was not true that "this case must at a future time be decided" by a "future jury". The prosecutor could have decided not to retry the matter. Nor was it true that "clearer evidence" would not "ever be produced". Indeed this habeas petition is testimony to the falsity of that assertion.

The overall impact of the charge was to coerce holdout jurors by suggesting they would *inevitably* cause an expensive retrial, with identical evidence. Those jurors

then had to consider not the evidence against Landano, but the cost retrial posed to the taxpayers.

This Court has never yet ruled on the constitutionality of a charge such as this. In *Jenkins v. United States*, 380 U.S. 445 (1965), however, this Court, acting in its supervisory capacity, condemned a supplemental charge where, as here, the jury indicated its inability to reach a verdict and the court, as here, misleadingly told the jury that if the court "excuse[d] [the jury] we have to try the case again with some other jury . . ." See *Jenkins v. United States*, 330 F.2d 220, 211 n.2 (D.C. Ct. of App. 1964).

Jenkins, supra, still has vitality, *Lowenfield v. Phelps*, 108 S.Ct. 546, 550-51 (1988). This case provides an opportunity for this Court, for the first time, to address the constitutional dimensions of coercive supplemental charges.

The courts below concluded that the coercive aspects of the charge were somehow mitigated by other aspects of the charge that were appropriately worded. In so ruling neither court below evaluated the charge in context. After two days of deliberation and an intervening week-end, the jury decided it "honestly felt" it could not reach a verdict. Fifty-three minutes after the supplemental charge, the jury was unanimous on eight counts. Obviously, then, the charge had coercive impact. *Moving at the rate of six minutes per count*, the jury convicted the petitioner.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should be granted for plenary review of this matter. Alternatively, this matter should be summarily reversed and remanded to the District Court for reconsideration in light of *Agurs, supra,* as set forth in Point IV above.

Respectfully submitted,

NEIL MULLIN
(Counsel of Record)
SMITH, MULLIN & KIERNAN
100 Executive Drive
Suite 340
West Orange, New Jersey 07052
(201) 736-7033

ERIC NEISSER
American Civil Liberties
Union of New Jersey
2 Washington Place
Newark, New Jersey 07102
(201) 642-2086

JOHN A. POWELL
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5913

VINCENT JAMES LANDANO, Appellant

vs.

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey

(D. C. Civil No. 85-4777)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF NEW JERSEY

Present: GIBBONS, *Chief Judge, SEITZ and HUTCHINSON, Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel July 27, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered September 30, 1987 and December 28, 1987, be, and the same are hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

September 9, 1988

Certified as a true copy and issued in lieu of a formal mandate on October 3, 1988.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

App. 3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5913

VINCENT JAMES LANDANO,
Appellant

v.

JOHN J. RAFFERTY, Superintendent Rahway State Prison, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey

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Appeal from the United States District Court for the District of New Jersey
(D.C. Civ. No. 85-4777)

Argued July 27, 1988

BEFORE: GIBBONS, *Chief Judge,*
SEITZ and HUTCHINSON,
Circuit Judges.

(Filed: September 9, 1988)

NEIL MULLIN, ESQUIRE (Argued)
Smith, Mullin & Kiernan, P.C.
100 Executive Drive, Suite 340
West Orange, New Jersey 07052
Attorneys for Appellant

W. CARY EDWARDS
Attorney General of New Jersey
State of New Jersey
Richard J. Hughes Justice Complex

LESLIE FAYE SCHWARTZ,
ESQUIRE (Argued)
Deputy Attorney General
Division of Criminal Justice
Office of State Grand Jury Review
P.O. Box CN086
Trenton, New Jersey 08625
Attorneys for Appellees

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Appellant Landano appeals the order of the district court denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982). This court has jurisdiction under 28 U.S.C. § 1291 (1982).

I. *Background*

In August 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearny, New Jersey. During the robbery, one of the gunmen shot and killed a Newark police officer. A Hudson County grand jury indicted Landano and three other men, Allen Roller, Victor Forni, and Bruce Reen, for felony murder and other crimes stemming from the robbery. The trial of Forni and Reen was severed. Roller plead *non vult* to the felony murder charge and agreed to testify against Landano, whose case proceeded to trial in New Jersey Superior Court.

The evidence at trial depicted the crime and its immediate aftermath essentially as follows. One of the perpetrators entered the trailer that housed the check cashing service, and the other remained outside. While the robbery was in progress, a Newark patrol car driven by Officer John Snow entered the parking lot of the service.

The perpetrator who had remained outside approached the patrol car and shot Officer Snow at close range, killing him. The two perpetrators sped away from the service in an automobile. They soon came upon a blocked intersection. In an effort to escape the traffic, the driver maneuvered on to a railroad right of way nearby and drove along the tracks for some distance.

The evidence linking Landano to the crime included the following. Roller testified that he and Landano committed the robbery, with Roller entering the trailer and Landano remaining outside. Roller also testified that when he rejoined Landano outside, Landano stated that he had had to "ice [or waste] the cop."

An employee of a warehouse near the scene of the crime testified that he saw a dark-haired man approach a police patrol car in the parking lot of the check cashing service. The employee tutrned away from the parking lot and then heard gunshots. When he looked back to the parking lot, he saw a green Chevrolet, driven by the dark-haired man, pulling away from the lot. The employee was unable to identify the dark-haired man, but Landano had dark hair.

Jacob Roth, the owner of the check cashing service, identified Landano as a participant in the crime. Roth, however, maintained that Landano was the one who entered the trailer, not the one who stayed outside. Roth also observed the license number of the vehicle in which the perpetrators drove away.

Raymond Portas, a truck driver, testified that while sitting at a blocked intersection in Kearny on the morning

of the crime, he saw a green Chevrolet maneuver out of traffic and then proceed along nearby railroad tracks. Portas's description of the license number of the vehicle matched Roth's. At trial, Portas identified Landano as the driver of the vehicle and testified that he had picked Landano's photograph out of an array at a pre-trial identification session.

After approximately two days of deliberation, the jury informed the trial judge that it was unable to reach a unanimous verdict on any of the counts submitted. The judge delivered a supplemental charge and ordered the jurors to resume their deliberations. Approximately one hour later, the jury returned a verdict finding Landano guilty on all counts. Landano was sentenced to life imprisonment on the felony murder count and a consecutive term of seven to fifteen years on the remaining counts.

After exhausting his state remedies, Landano petitioned the district court for a writ of habeas corpus. The district court denied relief, and this appeal followed.

II. *Discussion*

A.

Landano raises several arguments concerning Portas's testimony. First, he asserts that Portas's out-of-court identification was so unreliable that the trial court's decision to admit testimony as to that identification amounted to constitutional error under the totality-of-the-circumstances test set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). The district court rejected this argument. Our review is plenary. We too find the argument to be merit-

less. *Neil's* totality-of-the-circumstances test applies only to identifications obtained through suggestive techniques, and at the time of the trial there was no indication that the State had obtained Portas's out-of-court identification of Landano by suggestive means.

Landano's second argument stems from his claim that the State did in fact obtain both Portas's out-of-court and in-court identifications by suggestive means and that the prosecution violated the due process standards enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding that information from the defense. The factual basis for that claim derives from testimony Portas provided in a 1982 state court post-conviction hearing. At the hearing, Portas recanted the unequivocal identification testimony he had given at trial and now maintained that both his out-of-court and in-court identifications of Landano had been obtained by suggestive techniques.

The state post-conviction court found that Portas's recantation testimony was not credible. Although the district court conducted its own evidentiary hearing and took testimony from Portas, it determined that the state court's credibility finding was entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and that Landano had not overcome that presumption. Because under this analysis Portas's recantation testimony could not be credited, the court concluded that Landano had not established the necessary factual predicate to his *Brady* claim.

On appeal, Landano argues that the district court's deference to the state court's finding was improper under section 2254(d) because the hearing in state court was inadequate. In particular, he claims that the state court

prevented full development of a factual record by allowing counsel for the State to inhibit Portas's recantation testimony with threats of a perjury indictment and by denying Landano's request for pre-hearing discovery of certain documents relating to Portas's pre-trial photographic identification of Landano. We shall assume that Landano's argument raises a question of law as to which our review is plenary.

We conclude that the state court hearing comported with due process standards and was otherwise "full, fair, and adequate." 28 U.S.C. § 2254(d)(6). As to the alleged harassment of Portas at the hearing, we cannot see how the State's threats to Portas could possibly have inhibited the factfinding process. At the hearing, Portas thoroughly repudiated his trial testimony, and Landano does not suggest that Portas' recantation would have been more complete or more credible in the absence of the State's threats to indict Portas for perjury. Indeed, that Portas proceeded with his recantation in the face of such threats very likely enhanced his credibility. As to the state court's refusal to permit discovery, we do not believe Landano was prejudiced by his inability to gain access to the requested documents. The district court granted Landano the discovery he had been denied in state court, and the documents produced lend only weak support to Portas's recantation testimony. It is clear from a reading of the state court's written opinion that the court rejected Portas's recantation testimony because it found the testimony itself implausible, and there is no indication that the documents in question would have caused the court to regard the testimony more favorably.

Landano's final argument in connection with Portas's recantation is that, if section 2254(d) is properly read to mandate deference to the state court's credibility finding here, then that provision is unconstitutional as applied to this case. For this proposition he cites dicta in *Fay v. Noia*, 372 U.S. 391 (1963). In that case, the Court noted that at common law the writ of habeas corpus was available to remedy governmental restraints contrary to "fundamental law." *Id.* at 405. The Court then suggested that Congressional action to prevent the courts from giving the writ its full common-law scope might amount to an unconstitutional suspension of the writ. *Id.* at 405-06; U.S. Const. art. I, § 9, cl. 2. According to Landano, his continued incarceration constitutes a violation of fundamental law in light of Portas's recantation, and section 2254(d) is unconstitutional to the extent that it prevented the district court from granting him relief.

We assume the *Fay* dicta to be binding in this case, but we nevertheless reject Landano's argument. Courts have historically viewed recantation testimony with great suspicion. *See e.g., United States v. Kearney*, 682 F.2d 214, 219 (D.C. Cir. 1982). Thus, we doubt that the failure to grant a petition for post-conviction relief based solely on the recantation of a prosecution witness would have been regarded at common law as a violation of fundamental law. Moreover, in this case Portas's recantation testimony did not affirmatively exonerate Landano but merely called into question the validity of Portas's identification of Landano. In these circumstances, the district court's deference to the state court's assessment of Portas's recantation was not unconstitutional.

B.

Landano asserts that habeas relief must be granted because the prosecution violated the *Brady* standard by withholding from the defense certain information concerning Allen Roller.

At trial, Roller testified that he had plead *non vult* to a felony murder charge in connection with the robbery of the check cashing service. He also testified that he was cooperating with the State pursuant to assurances that he would not receive a sentence in excess of thirty years and that the State would dismiss charges against him stemming from the robbery of a Jersey City bar. He did not allude to any other charges pending against him. Roller admitted that Victor Forni had participated in the planning of the Kearny robbery, but he denied that Forni had played any role in the execution of the crime. Roller also denied having participated with Forni in other crimes.

After the trial, it came to light that Roller had been linked to two armed robberies in Perth Amboy, New Jersey, that occurred before the Kearny robbery. Landano moved for a new trial on the basis of this information. After holding hearings, the trial court found that before Landano's trial a witness to the Perth Amboy robberies had tentatively identified Roller, Forni, and Bruce Reen as possible perpetrators of those crimes. The court also found that the prosecutor in Landano's case had had constructive knowledge of the information linking Roller to the Perth Amboy robberies.

The prosecution's non-disclosure of evidence amounts to a *Brady* violation only if the evidence is both exculpatory and material. Evidence is "material" in this con-

text "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J., joined by O'Connor, J.); *accord id.* at 685 (opinion of White, J., joined by Burger, C.J., and Rehnquist, J.) (agreeing with Justice Blackmun's definition of materiality).

The district court determined that the evidence of Roller's possible participation in the Perth Amboy robberies was exculpatory, but the court went on to hold that the evidence was not material. Accordingly, the court concluded that no *Brady* violation had occurred. Whether evidence is material for purposes of the *Brady* analysis is a mixed question of law and fact. *Carter v. Rafferty*, 826 F.2d 1299, 1306 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 711 (1988).

We agree with both parts of the district court's analysis. The evidence was exculpatory because the defense could have used it to impeach Roller on cross-examination, *see Giglio v. United States*, 405 U.S. 150, 154 (1972), and perhaps also as substantive evidence that Roller and Forni generally operated together, *see* N.J. R. Evid. 55. The evidence was relevant both to Roller's credibility and to Landano's defense that Forni, rather than Landano, had accompanied Roller during the robbery and had murdered Officer Snow.

Nevertheless, we do not believe that the evidence was material under the *Bagley* standard. Roller was presented to the jury as a convicted felon, so evidence tending

to link him with another crime would have had at best a marginal effect on the jury's assessment of his general credibility. The materiality question is a somewhat closer one to the extent that the evidence would have permittetd an inference that Roller and Forni operated together on other occasions and therefore operated together in carrying out the Kearny robbery. We note, however, that such an inference would have been at best a tenuous one.[1] Moreover, any such inference would have been directly at odds with other, stronger evidence implicating Landano in the crime, e.g., Portas's testimony. We thus conclude that there is no reasonable probability that an acquittal would have resulted had the evidence been made available to the defense.

C.

Landano next argues that the prosecution violated the *Brady* rule by withholding evidence of an investigation into allegedly questionable dealings on the part of Jacob Roth and his check cashing service. On the basis of comments made in a 1981 lecture by the prosecutor who had tried Landano's case, the district court found that such an investigation in fact took place before the trial and that Roth was aware that he was under suspicion of wrongdoing. The court then determined that information as to the investigation of Roth was exculpatory but not material. Hence, the court found no *Brady* violation.

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1. It was undisputed at trial that the murder weapon in the Kearny robbery was a gun belonging to Forni. That fact, however, is just as easily explained by the prosecution's version of the crime—that Forni helped plan the robbery but did not assist in its execution—as by Landano's theory that Forni was one of the gunmen.

Evidence of the investigation of Roth was exculpatory because the defense could have used such evidence at trial to impeach Roth; that Roth was the subject of a state investigation would have permitted an inference that his testimony was not credible because it had been secured by the State's implicit or explicit coercion. *See State v. Mazur,* 385 A.2d 878, 886-87 (N.J. Super., App. Div. 1978). The information, however, cannot be considered material under the *Bagley* standard. Roth's credibility was already undermined by the fact that his recollection of the robbery was fundamentally at odds with that of Roller and the employee of the nearby warehouse. Roth maintained that Landano was the perpetrator who went inside the trailer; Roller testified that Landano stayed outside, and the warehouse employee stated that a dark-haired man (who could not have been Roller) remained outside. Moreover, although at trial Roth characterized his earlier out-of-court identification of Landano as "positive," two detectives testified that Roth's identification had been only tentative. Thus, even if the defense had been able to impeach Roth with the evidence of the investigation, its marginal effect in diminishing Roth's perceived credibility would have been negligible. In view of the other evidence supporting the guilty verdict, we find no reasonable probability that disclosure of the evidence in question would have produced a different result at trial.

D.

Finally, Landano contends that the trial court's supplemental charge to the jury violated his sixth amendment right to a jury trial and his fourteenth amendment due

process rights. The district court rejected this claim. Our review is plenary.

After deliberating for approximately two days, the jury informed the trial court that it was unable to reach a verdict. The court then delivered a supplemental charge and ordered the jurors to continue their deliberations. The gist of Landano's argument is that the court improperly coerced a unanimous verdict by instructing the jurors in the supplemental charge that "this case at a future time must be decided." Landano observes that this statement was false because, had a hung jury resulted, the prosecutor may have chosen not to re-try him. He asserts that the court's "misrepresentation" amounted to constitutional error.

Viewing the supplemental charge as a whole, we conclude that Landano's assertion is unfounded. The charge did not suggest that the case "had to be decided" by the particular jury hearing the charge. Rather, it acknowledged the possibility that those jurors might not be able to reach a unanimous verdict, and it fairly informed them that they had a duty to reach a verdict only if that was possible. The court's implication that the case would inevitably be re-tried in the event of a hung jury and may not have been literally correct, but we cannot say that the inaccuracy was of constitutional dimensions.

III. *Conclusion*

For the foregoing reasons, we shall affirm the order of the district court denying habeas corpus relief.

A True Copy:

Tests:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner,	)	
vs.	)	Civil Action No. 85-4777
JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, Respondents.	)	OPINION (Filed Sept. 29, 1987)

SAROKIN, District Judge

The murder of a police officer is a tragic event, not only for the loss sustained by the officer's family, but because it is the ultimate symbol of lawlessness. That tragedy is compounded however, if there is a risk that an innocent person has been convicted of such a despicable crime. The record in this case demonstrates that there is just such a risk, but because of binding precedent this court is powerless to grant the relief which petitioner seeks and to which this court believes he is entitled.

A critical prosecution eyewitness, a public spirited citizen who came forward with evidence immediately after the crime, now once again has voluntarily come forward to cast doubt upon petitioner's conviction and his own testimony which may have caused it.

Although discussed in more detail hereafter, the witness, Raymond Portas has testified under oath that (1) when he was first asked to identify the driver of the auto-

mobile (the driver being identified by others as the murderer) some months after the crime from a photo array, he selected someone other than the petitioner Mr. Landano; (2) that photograph was removed by the police never to be seen or identified again; (3) that incident is corroborated by the fact that two photos are missing from that array and their absence is unexplained; (4) thirteen days later while waiting to testify, Mr. Landano and his attorney walked by Mr. Portas and he did not recognize Mr. Landano; (5) an officer informed Mr. Portas with respect to these two persons that one was "our man"; (6) even then, Mr. Portas did not know which of the two was the alleged perpetrator; (7) he only made that determination by process of elimination—when the lawyer rose to speak, he concluded the remaining person was the one he was to identify, which he did.

His qualms of conscience were not slow in festering. Immediately upon the conclusion of his testimony he considered speaking to the judge. Doubting its propriety, he sought out the counsel of a priest, who assured him that the police knew what they were doing and not to be concerned. His concerns were allayed but never completely extinguished. He undoubtedly took comfort from the fact that other evidence existed which supported the conviction which was subsequently entered.

However, years later, in reading a magazine article about the case, he learned that much of the other evidence was suspect and realized that his testimony rather than being merely corroborative was crucial to the outcome. All of his qualms were reawakened. Again acting out of the purest and most honorable of motives he went not to the

defendant or his counsel, but rather to the prosecution to express his concerns and doubts. The prosecutor's office turned a deaf ear to his entreaties, and then and only then, did he communicate with the defense after first tracking down the author of the magazine article to ascertain defense counsel's identity.

True there are some discrepancies and inconsistencies in Mr. Portas' testimony and contrary evidence offered by the prosecution. But on the critical facts Mr. Portas has not waivered since he brought these matters to the attention of the parties. He is an honorable, intelligent and obviously conscientious person. He has no reason or motive to lie. His self doubts were not the result of a lengthy process or intercession by anyone, but followed immediately upon his testimony—even before the conviction.

This court conducted a hearing and found the testimony of Mr. Portas to be believable. If the jury had heard what he has now revealed, it might never have convicted the petitioner. On the other hand, the state court found Mr. Portas' testimony on these matters to be incredible, and denied a new trial. The obligation of this court to defer to the factual findings of the state court makes it impossible to grant the relief sought. The court candidly admits an exhaustive search for grounds to grant the writ, but could find none without violating the court's oath to follow existing precedent. In upholding the law, the court fears that a great injustice has occurred and respectfully invites reversal of its decision.

PROCEDURAL HISTORY

Petitioner, Vincent James Landano, comes before this court seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On October 6, 1976 petitioner was indicted by a Hudson County Grand Jury on one count of felony murder (N.J.S.A. 2A:113-1 and 2), three counts of armed robbery (N.J.S.A. 2A:141-1 and IA:151-5), one count of breaking and entering with intent to steal (N.J.S.A. 2A:94-1), one count of receiving a stolen motor vehicle (N.J.S.A. 2A:139-3), one count of illegal possession of a firearm (N.J.S.A. 2A:151-41) and one count of conspiracy to commit armed robbery (N.J.S.A. 2A:98-1). Also named in the indictment were three co-defendants, Allen Roller, Victor Forni and Bruce Reen.

On April 6, 1977, the prosecution of co-defendants Forni and Reen, each of whom was then confined in New York and contesting extradition, was severed from that of petitioner and co-defendant Roller.

On April 18, 1977, Roller entered a plea of *non vult* to the felony murder charge alleged in the first count of the indictment pursuant to a plea agreement reached with the Hudson County Prosecutor. The agreement provided that Roller would testify against petitioner at trial.

The following day, April 19, 1977, petitioner's trial began before the Honorable Maurice A. Walsh, Jr., J.S.C. and a jury. Following 19 days of trial, on May 17, 1977 petitioner was found guilty on all counts. As a result of the jury's verdict, the court sentenced petitioner to life

imprisonment on the felony murder count and a consecutive seven to fifteen year term for the remaining offenses.

Petitioner filed a Notice of Appeal on June 29, 1977. On September 26, 1978, petitioner filed a motion in the Superior Court of New Jersey. Appellate Division seeking to remand to the trial court for consideration of a motion for a new trial on the basis of newly discovered evidence. An order granting that motion was subsequently entered by that court on October 17, 1978.

On November 20, 21 and 27, 1978 evidentiary hearings pursuant to petitioner's new trial application were conducted before Judge Walsh by opinion and order dated December 1, 1978. Judge Walsh denied petitioner's application. Thereafter, on March 21, 1980, the Superior Court of New Jersey, Appellate Division denied both petitioner's direct appeal and the consolidated appeal from the denial of a motion for new trial. Landano's petition for certification was denied by the New Jersey Supreme Court on July 8, 1980. *See State v. Landano*, 85 N.J. 98 (1980).

On March 31, 1982, petitioner filed a verified petition for post-conviction relief and supporting brief. Hearings pursuant to this petition were conducted before the Honorable Joseph P. Hanrahan, J.S.C. on June 16, September 22, October 6 and 28, and November 17, 1982. Judge Hanrahan issued a series of letter opinions concerning the numerous issues raised and ultimately denied the relief sought in an order dated January 4, 1984.

Petitioner appealed Judge Hanrahan's ruling to the Appellate Division. On January 30, 1984, that court denied petitioner's appeal. On June 13, 1984, the Supreme Court of New Jersey denied certification.

On October 10, 1985, petitioner filed the instant habeas corpus petition. Having properly exhausted the available state remedies, petitioner's application is ripe for disposition by this court.

As grounds for relief petitioner alleges: (1) that his due process rights to a fair trial were infringed by the admission of Raymond Portas' identification testimony; (2) that the state unlawfully supressed exculpatory and material evidence that would have impeached the testimony of co-defendant Allen Roller; (3) that the state unlawfully suppressed excupatory and material evidence that would have impeached the testimony of Jacob Roth, victim of the armed robbery; and (4) that state court's coercive charge to the jury violated the petitioner's Sixth Amendment right to an impartial jury.[1]

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[1] Petitioner's original application included an allegation that the state unlawfully suppressed information of Gregory Snow's involvement in the instant crime; information which petitioner claims would have been both exculpatory and material. However, this court notes that Judge Hanrahan in his opinion denying petitioner's post-conviction relief application specifically found that "[a] police report referring to Officer Snow's son's involvement in this trial was made available to [petitioner] prior to trial". Counsel for petitioner does not dispute that such report or reports were available at trial but contends that additional information exists, namely, a taped interview. However, the existence of the tape was known to defense counsel at the time of trial as it is referred to in the reports that were produced upon discovery. *See* Habeas Corpus petition, dated October 9, 1985 at 27. In light of the fact that counsel was free to request such information, and that the state was acting in good faith by disclosing the tape's existence, the court finds that this claim is not the proper basis for habeas corpus relief. Therefore, the court will focus its attention on the other claims enumerated.

FACTS

The underlying facts may be distilled from the many state court opinions. The events leading up to the crime for which petitioner was convicted involved the activities of a "motorcycle gang" known as "The Breed". According to testimony at trial by Breed members and affiliates, the Breed frequently planned and executed armed robberies in the Staten Island area. Testimony at trial revealed that in June 1976 Allen Roller, president of The Breed's Staten Island chapter, together with Victor Forni, not a "Breed" member but reputedly responsible for organizing most Breed criminal endeavors, conceived a plan to rob the Kearny, New Jersey Check Cashing Service owned and operated by Jacob Roth.

Though it was undisputed at trial that petitioner, Vincent James Landano, was neither a Breed member nor a Breed affiliate, co-defendant Roller testified that petitioner had been specifically recruited for this job when another Breed affiliate refused to participate. Roller admitted that Forni and not petitioner was responsible for orchestrating the Kearny robbery, but Roller vigorously denied Forni's participation in the crime's execution. Roller's testimony revealed that petitioner was a long standing friend of Forni's and that Forni had suggested recruiting Landano for this job.

In the early morning hours of August 13, 1976, Allen Roller together with a "dark-haired" associate who Roller identified as the petitioner arrived at the Hi-Way Cash Checking Service. Roller testified that he approached the window of the Roth check cashing trailer, forced his way

into the trailer and controlling the occupants with his gun, proceeded to steal the available cash.

During this time a Newark patrol car driven by Patrolman John Snow arrived in the Roth parking lot. The dark haired perpetrator approached the vehicle and opened fire at close range killing Officer Snow. Thereupon the perpetrator reached inside the vehicle and removed an attache case containing $46,000 intended for delivery to Hi-Way Checking.

Roller testified that the two immediately returned to their vehicle and sped away from the crime scene with petitioner driving and Roller in the back seat. According to Roller, petitioner confessed upon return to the car that he had had to "ice [or waste] the cop." It was later discovered that the gun used to kill Officer Snow was Forni's gun.

Joseph Pasciutti, an employee of an adjacent warehouse, testified that he had witnessed a dark haired man approach the patrol car in The Hi-Way Check Cashing parking lot. Pasciutti testified that he had momentarily turned away from the crime scene and that his back had been turned when he heard three or four gunshots. When Pasciutti redirected his attention to the check cashing facility, he testified that he saw a Chevy pulling away and that the dark haired perpetrator was driving. Pasciutti was not able to identify petitioner as the dark haired perpetrator.

In an effort to escape the crime scene, the vehicle proceeded through Kearny and came upon a blocked intersection. The driver's frantic efforts to escape the traffic at-

tracted the attention of Raymond Portas, a truck driver whose truck was stopped in the intersection. Portas testified that he viewed the vehicle maneuver onto nearby train tracks and proceed to drive along the rail. Though unable to identify Roller as the vehicle's passenger, Portas testified at trial that petitioner was the driver of the car.

The evidence presented against petitioner at trial included Roller's testimony naming Landano as his partner in crime; Pasciutti's testimony that the dark haired perpetrator responsible for killing Officer Snow was also the driver of the getaway car and Portas' identification of petitioner as the driver of the vehicle identified as the getaway car.

DISCUSSION

I. *The Portas Identification*

In bringing this habeas corpus application, petitioner alleges a deprivation of his due process right to a fair trial as a result of the improper admission of Raymond Portas' identification testimony. In large part, the basis for petitioner's motions results from information discovered subsequent to trial as the result of Mr. Portas' recantation of his trial testimony.[2]

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[2] Relying on the Supreme Court's holding in *Neil v. Biggers*, 409 U.S. 188 (1972), petitioner argues that without even reaching the merits of Portas' post-trial testimony and the undue influence alleged, the record supports a finding that it was error for the trial court to admit Portas' out-of-court identification. Addressing the reliability factors set forth in *Biggers*, petitioner contends that the lapse of eight months between the confrontation and Portas' photographic identification, Portas' momen-

(Continued on following page)

The court begins its analysis by noting that Raymond Portas was a critical prosecution witness. Through the testimony of Joseph Pasciutti, an employee of an adjacent warehouse who witnessed the crime, the state was able to establish that the "dark-haired" perpetrator, responsible for killing Officer Snow, was the driver of the getaway car. *See* Trial Transcript of April 28, 1977, VIIIT at 90-92. Pasciutti however, was unable to identify petitioner as the driver; and, in fact, described the driver as having "curly hair" and "no mustache" whereas a photo or petitioner taken on the day of the crime, some hours after the shooting occurred, reveals Landano to have had long straight hair and a prominent bushy moustache. *See* Trial Exhibit

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(Continued from previous page)

tary viewing of the perpetrators, Portas' inability to correctly identify Roller as the passenger and finally, Portas' description of petitioner as having no moustache, cumulatively compel a finding that there existed a significant likelihood of misidentification. This court cannot agree.

First, the *Biggers* analysis is only triggered where it can be illustrated that the identification procedure was suggestive. Reviewing the record devoid of Portas' recantation, there is no basis upon which to conclude that the photographic identification was suggestive. Portas testified at the *Wade* hearing that he had been shown an array of dark haired perpetrators (S-2) and that he was able to select petitioner's photograph without any prompting. While Portas admitted that the prosecutor had confirmed his choice remarking "That's him", there was no allegation prior to the recantation that this remark preceded or in any way influenced the identification. In view of the fact that at the time of the *Wade* review Portas demonstrated certainty in his identification of petitioner and further that Portas testified to having had an unobstructed view of petitioner in close proximity and to having paid acute attention to the car's maneuvering; this court concludes that it was not a violation of due process for the trial court to have admitted Portas' identification on the record as it stood at the time of trial.

D-13. Raymond Portas was the only witness presented at trial who was able to identify petitioner as the driver of the car and thus create the inference that petitioner had killed Officer Snow.

Mr. Portas, employed as a truck driver in August 1976, testified at trial that on August 13, 1976 he had witnessed petitioner and another passenger as they drove through an intersection in Kearney. Portas testified that his attention had been drawn to this car because of its erratic driving pattern. The driver, seeking to avoid a blocked intersection, maneuvered the car onto nearby railroad tracks and proceeded to drive along the parallel tracks. According to Portas, due to the vehicle's backward maneuvering he had a more direct view of the driver than the passenger and was able to view the driver full face at a distance of approximately fifteen feet for a minute and a half. *See* Transcript of Portas Voir Dire testimony, April 25, 1977, at 48-50; Trial Transcript at 8.45.

At trial it was established that prior to his court appearance, Mr. Portas had had two opportunities to view photographs in an effort to identify the perpetrators of the crime. The first viewing took place on August 13, 1976, the day of the crime, at which time Portas was asked to identify the backseat passenger. The record reflects that Portas erroneously identified William Applegate and not co-defendant Roller.

Subsequently, on April 15, 1977, almost eight months after the crime and ten days before trial, Portas was summoned to the Hudson County Prosecutor's office. Portas testified that he was shown two groups of photos on this occasion, one of "men with beards" and the other of dark-

haired perpetrators. *See* Trial Transcript, April 28, 1977, at 8.43-8.46; 8.59. Portas acknowledged having difficulty selecting the backseat passenger noting that the individual depicted looked "fatter" than he recollected. *See* Trial Transcript at 8.43.

However, of critical significance to the state's case, Portas testified that he was able to positively identify petitioner's photo from the second array. Trial Transcript at 8.45.[3] Portas testified that he believed petitioner to be the driver of the car. Trial Transcript at 8.46:1. In response to the prosecutor's inquiry "Do you see the man in court today who you believe to be the driver of the vehicle?" Poras responded affirmatively and identified the petition. Trial Transcript 8:46:9-14.

On cross-examination, Portas testified that after having identified petitioner's photo (marked S-2A for identification) in the prosecutor's office, a member of the prosecutor's staff present in the room confirmed the identification responding "Yes. That's him". Trial Transcript at 8.62. On redirect examination however Portas averred that he was not given any indication of which potograph to select prior to his independent identification and that any confirming remark followed his independent selection. Trial Transcript at 8.63. Further, the prosecutor elicited testimony establishing that Portas in-court identification of the petitioner was based on his "recollection of the incident of August 13th [1976]" and not the product of any suggestion made to him upon selection of petitioner's

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[3] Portas' identification of Landano was memorialized in a sworn statement executed with the assistance of Detective Frank Xavier on April 15, 1977.

photograph thirteen days earlier. Trial Transcript at 8.64:-13.

In 1982, approximately five years after petitioner's trial, Portas came forward seeking to recant his testimony. Portas' recantation was made part of petitioner's application for post-conviction relief addressed to the New Jersey Superior Court. An evidentiary hearing was granted, and conducted by the Honorable Joseph P. Hanrahan in October 1982.

Portas' testimony at this post-conviction hearing differed from his trial tesimony in two critical aspects: (1) Contrary to his prior testimony, Portas revealed that he was unable to independently identify petitioner's photo on April 15, 1977. On October 6, 1982 Portas recalled that upon being shown a series of photos of dark-haired perpetrators he first selected a photo of an individual other than the petitioner. According to Portas, the prosecutor "picked up the picture I picked out and handed it to the other fellow and he left the room". *See* Transcript of October 6, 1982 Evidentiary Hearing at 7. Portas further testified that to the best of his recollection, he never saw that photograph again. October 6, 1982 Hearing at 8.

Portas testified that after having removed this first selection, the prosecutor allowed Portas to continue reviewing the remaining photographs while engaging him in causal conversation. Portas recalls that at one point he remarked to the prosecutor: "You know, if this man wasn't so fat, I would have picked him". October 6, 1982 Hearing at 8. According to Portas the prosecutor responded to this tentative selection by saying "That's the man we want" and asking Portas to initial the back of the

photograph. October 6, 1982 Hearing at 9. This second photo was of the petitioner Vincent James Landano. In an affidavit sworn to by Mr. Portas, dated November 20, 1981, Mr. Portas certified that "[i]f, on April 15, a detective had not said we think he is the one I would not have signed Landano's photograph". October 6, 1982 Hearing at 40.

(2) Portas testified that prior to his in-court identification of Mr. Landano he had been seated in the hallway outside the courtroom. Two gentlemen whom he describes as well-dressed passed him in the hallway. Portas testified on direct examination that he had not recognized the petitioner when petitioner passed him in the hallway. October 6, 1982 Hearing at 10-11. Immediately following, Mr. Portas entered the men's room where he was approached by a person whom he assumed to be a detective. According to Mr. Portas the detective asked him: "Do you know who the two were that just went in?" Without awaiting a response, the detective then remarked to Portas "You know, that's our man". October 6, 1982 Hearing at 10. Shortly thereafter, Portas entered the courtroom and identified the petitioner as the man he had seen driving the getaway car on August 13, 1976.

Mr. Portas testified that this "bathroom incident" in particular had given him great pause. He testified that he "was not sure" of his identification of the petitioner, not sure that he "shouldn't have told somebody that a policeman followed [him] into the bathroom to tell [him], to make sure [he] picked out the guy". October 6, 1982 Hearing at 15 and 17. Portas testified that he believed he had been "influenced" in his identification. *See* Transcript of October 28, 1982 Hearing at 53. In his own words, Portas

explained "It's very hard to know whether you've been influenced or not, as far as I'm concerned. I don't know". October 6, 1982 hearing at 68.

As a result of this uneasiness, Portas testified that he considered going to see the judge immediately, but chose instead to contact his priest, Father Ashe. October 28, 1982 Hearing at 53. Portas voluntarily applied to Father Ashe for assistance within a day or two of his testimony; prior to return of a guilty verdict. Having been assured by his priest that the police and the prosecutor "know what they are doing"; Portas let the matter rest. It was not until the publication of a magazine article in the October 1981 issue of the New Jersey Monthly analyzing Landano's trial and depicting the conviction as having been based upon a paucity of evidence, that Mr. Portas' concerns were revived and he took the initiative in communicating with petitioner's counsel concerning a recantation.[4]

In an opinion dated December 3, 1982, the court denied petitioner's application for a new trial based on Portas' recantation. As set forth in the court's opinion, the state standard for evaluating a recantation upon a motion for a new trial is "whether it casts serious doubt upon the truth of the testimony given at the trial and whether, if believable, the factual recital of the recantation so seriously impugns the entire trial evidence as to give rise to the conclusion that there resulted a possible miscarriage of justice".

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[4] Portas testified that his initial effort was to contact the state with the information concerning the bathroom incident and the tampered photo identification. However, according to Mr. Portas the prosecutor's office informed him that "they didn't think it mattered". See Transcript of October 6, 1982 Hearing, at 28.

State v. Puchalski, 45 N.J.97, 107-8 (1965). Therefore, as a threshold matter the court had to find, as a matter of fact, that Portas' recantation statement was believable. Only upon such factual determination could the court apply the requisite legal analysis and conclude as a matter of law that the trial-testimony was so seriously impugned as to support the conclusion that there resulted a possible miscarriage of justice.

The court however, found Portas' testimony to be "untrustworthy" and therefore "lack[ing] the capacity to cast serious doubt upon the truth of his trial testimony". *See* State's Appendix, Volume II at 230A. Having observed Portas' "manner of expression, sincerity, candor, and straightforwardness", the court explained that it had "received the impression that Mr. Portas [felt] that he 'pressed the button' that condemned Landano". *Id.* at 227A. After summarily reviewing the other evidence presented at trial, the court determined that Portas' concern for having single-handedly convicted Landano was "clearly without merit." *Id.* at 230A.

As to the bathroom incident, the court found: (1) that it was conceivable that a large number of people might have been in that hallway; (2) that there was no reason for Portas to have noticed the particular two men in question; (3) that Portas "assumed", but was not certain that the man who had followed him into the bathroom was a detective; (4) that Portas did not see these men go into the courtroom; (5) that Portas never stated that the gentlemen in the bathroom described or pointed out Landano and finally (6) that based on Portas' testimony, Portas was not certain that this gentlemen influenced

him in his in-court identification of Landano. *Id.* at 228A.

As to the photo indentification, the court concluded that "Mr. Portas without the slightest suggestion from any member of the prosecutor's staff selected Mr. Landano's photograph from one set of photographs and an accomplice's photograph from another set of pictures. *Id.* at 229A. The state court's opinion ignores or implicitly rejects Portas' testimony that he misidentified one of the dark-haired perpetrators depicted in the photo array prior to his tentative identification of Landano and further, that Portas would not have selected Landano's photo but for a *prior* suggestion by the prosecutor that "that's the man we want". However, given the inconsistencies in Portas' trial testimony and his testimony at the evidentiary hearing, this court must conclude that the state court's acceptance of Portas' trial description of the April 15, 1977 identification procedure implied a finding that Portas' subsequent testimony was not believable, and therefore undeserving of further analysis. *Id.* at 229A.

The court has reviewed the hearing and in particular the state's cross-examination of Portas. The court can well understand the state's interest in preserving a conviction once obtained, however that interest must be tempered by a respect for the rights and dignity of an impartial, law abiding individual who has come forward with evidence as a good citizen. In reading the transcript one could reasonably conclude that the witness had become the criminal. The examination was not a search for the truth but rather an exercise in harassment and intimidation in an effort to dissuade the witness from any re-

cantation. The court respectfully suggests that the prosecutor's role though continuing to be an advocate should demonstrate as much interest in obtaining exculpatory as well as incriminating information in this type of post-trial proceeding.

During the course of that proceeding Mr. Portas was reminded eleven times that his prior testimony had been under oath. He became concerned about a perjury charge. *See* Transcript of October 28 1982 Hearing at 52-53. No one ever sought to dissuade him from that concern. As a result this court determined to conduct its own hearing, assuring Mr. Portas that he was free to reject his trial testimony if he was truthful in doing so.

The power to require an evidentiary hearing in a federal habeas corpus proceeding is vested in the "sound discretion" of the district judge. *See Townsend v. Sain,* 372 U.S. 293, 318 (1963). A district court may order a plenary hearing even though one is not obligatory. The court in this instance based its decision to conduct an independent hearing on several factors. First recognizing the centrality of Portas' identification testimony to establishing petitioner as the driver of the getaway car and thus by inference the murderer the court determined that it was appropriate to provide Portas with an uninhibited opportunity to proffer his recantation. Second in light of newly discovered evidence raising a possibility that the photo Portas erroneously identified prior to selecting Landano which according to Portas was subsequently removed was that of Victor Forni the court deemed it appropriate to confront Mr. Portas with a photograph of

Forni.[5] Finally given the state court's failure to make specific findings as to Portas' inability to identify Landano from the array of dark-haired perpetrators absent prompting by the state this court determined that an additional more in-depth explanation of the circumstances surrounding this incident was warranted.

Accordingly, on September 2, 1987, this court conducted its own evidentiary hearing of Raymond Portas.[6]

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[5] See May 12, 1987 Letter from Neil Mullin, counsel for Petitioner. On April 1, 1987 counsel for petitioner had an opportunity to review the Hudson County Prosecutor's files pursuant to an order of this court. Counsel discovered a document entitled "Property and Evidence Report" which reflects that on April 15, 1977, the day Portas was summoned to identify petitioner, two (2) photographs of Victor Forni were removed from the prosecutor's vault for the apparent purpose of a photo array. Second, on April 15, 1987 counsel discovered a manila folder containing photos of Victor Forni which a Detective Michael D'Andrea suggested had been shown to a "truck driver" during the Landano investigation. It is on the basis of this circumstantial evidence that the court infers that Portas may have seen and identified a photo of Forni prior to his selection of the Landano photo.

[6] Upon the suggestion of Neil Mullin, counsel for the petitioner, the court had also seen fit to call Mr. Frank Xavier, formerly employed as a detective by the Hudson County Prosecutor's office as a possible witness. Ex-detective Xavier had been responsible for supervising Portas's photo identification on April 15, 1977, the date here in question. It was this court's impression that Mr. Xavier might be able to expand upon testimony offered by Mr. Portas. However, on the morning of September 2, 1987 Mr. Xavier communicated to the court that he was unable to appear as he was severely understaffed and could not leave his retail business unattended. The court, finding that Mr. Xavier had established adequate cause pursuant to Federal Rule of Civil Procedure 45(f), excused his appearance that day. Upon the conclusion of Mr. Portas' testimony the court inquired of counsel whether they desired Mr. Xavier's appearance. Both defense counsel and counsel for the state declined teh opportunity to call Mr. Xavier to the stand. In light of this waiver, Mr. Xavier was excused from any obligation to appear.

Having had an independent opportunity to observe Portas' demeanor on the stand and to assess his credibility as a witness, this court is convinced that Raymond Portas is a credible witness and further, that his recantation testimony is believeable. The court was struck by Mr. Portas' sincerity and candor. His testimony reflects a persistent effort to carefully recall, to the best of his ability, the events of 1976 and 1977 and a similar willingness to honestly admit those facts he was unable to remember. Moreover, Mr. Portas consistently testified that his uncertainty regarding the identification of petitioner was not the product of fading memory but rather had plagued him at the time of the trial itself. Portas reconfirmed his earlier recantation testimony that he had considered bringing his concerns to the judge's attention even before leaving the Courthouse on April 28, 1977, but that he had chosen the counsel of a priest instead whose advice had assuaged Portas' fears. Such contemporaneous misgivings enhance the credibility of Portas' testimony. Similarly, the fact that two photos from the S-2 array of dark-haired perpetrators were missing at trial and that no adequate explanation has been offered for their disappearance, further strengthens this court's finding as to Portas' believability.[7]

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[7] The state has attempted to provide the court with an explanation for these missing photographs. The state suggests that the missing photographs from the S-2 array were accidentally misfiled in the S-1 photo array. The state explains that the numerical markers on the top right hand corner of the S-2 array appear on the misfiled S-1 photos and that the numbers correspond to those missing from the S-2 folder.

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As a result of the September 2, 1987 hearing, this court finds the following facts: (1) Portas is unable to recall at this late date whether or not he was ever shown a photograph of Victor Forni, or whether he ever had occasion to see Victor Forni in person; (2) Portas' in-court indentification of the petitioner was tainted by the suggestive comments made to Portas in the bathroom immediately prior to his trial appearance.

(a) This court finds it reasonable to infer from Portas' testimony that the individual who approached Portas in the bathroom was a detective or other state agent. Only the state retained a substantial interest in securing Portas' identification. It is unlikely that any stranger to the case would have made such a statement.

(b) Further the court finds that the bathroom statement was "impermissibly suggestive" so as to create a "very substantial likelihood of irreparable misidentification". *See United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985). Portas testified before this court that on April 28, 1977, only thirteen days after having been shown a photo of the petitioner and informed by the state that he was "our man", he was unable to recognize Landano

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The court finds this explanation implausible because even according to the state's own version, Raymond Portas was only shown the S-5 and S-2 photo arrays such that the prosecutor on April 15, 1977 could not have accidentally placed the S-2 photos in the S-1 folder. Second, the S-1 array was available to the state at trial and in fact, was presented to various witnesses but no error in numbering or sequence was detected at that time. It is on the basis of these facts that the court concludes that no adequate explanation has been offered for the disappearance of the S-2 photos.

as Landano passed him in the hallway. In addition, Portas testified that subsequent to the bathroom instruction identifying Landano as one of the two men, he was still unable to distinguish between Landano and defense counsel upon entry into the courtroom; and in fact, was only able to identify Landano as the defendant after his counsel introduced himself as such.

In light of this testimony, the court finds that on April 28, 1977, Raymond Portas lacked any "independent recollection" of the petitioner as the man he had seen driving the vehicle on August 13, 1976. *See United States v. Crews*, 445 U.S. 463 (1980).

(3) Finally, the court finds Portas' April 15, 1977 pre-trial identification of Landano to be suspect. In attempting to identify the dark-haired perpetrator from the S-2 photo array on April 15, 1977, Portas insists that he initially identified an individual other than the petitioner whose photo was then removed, and not reproduced by the state at trial. This information, denied by Detective Xavier, *see* Transcript of October 28, 1982 Hearing at 131, 143-44, was not available to the defense at trial and never presented to the jury. Finding Portas to be "credible" in his assertion, and finding that Portas' recital is corroborated by such circumstances as the unexplained missing photos from the S-2 array, and the suggestion by Hudson County Investigator Michael D'Andrea on April 4, 1987 "that a manila folder containing Forni's photo had been shown to a "truck driver" during the Landano investigation but never produced at trial, this court is compelled to doubt the validity of Portas' pre-trial identification of the petitioner. *See* Certification of Neil Mul-

lin, dated May 12, 1987, and Certification of Michael D'Andrea, dated June 1, 1987.[8]

In deciding which of two conflicting versions in this type of proceeding are credible, the court, whether it be the state or federal, may be usurping the function of the jury. If this conflict had been presented to the jury at the time of trial, the jury would have made the credibility judgment that has been made here. The test should not be which version the court believes, but whether the proferred testimony is sufficiently credible and reliable so that a reasonable jury might accept it as the truth. The fact that two judges have heard the same evidence and reached different conclusions as to its credibility indicates that a jury might well do the same.

However, having held its own evidentiary hearing and having had an opportunity to conduct independent fact finding, this court must now confront the difficult question of what legal significance it may attach to *its* findings. The mere fact that a district court exercises its discretion to conduct an independent hearing does not remore the statutory constraints upon the court's ability to rely on those findings absent adequate legal justification to reject existing, conflicting state court findings.

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[8] In his Certification of June 1, 1987, Mr. D'Andrea attempts to retract his original oral representation to petitioner's counsel that a manila folder containing photographs of Victor Forni was shown to a "truck driver" in connection with the Landano investigation. The court finds Mr. D'Andrea's effort to undermine the significance of his suggestion both implausible and inadequate to detract from the credibility of his spontaneous utterance. The court there rejects Mr. D'Andrea's post hoc efforts to deny previous representations that Portas had viewed the Forni photographs.

Section 28 U.S.C. § 2254(d) establishes a presumption of correctness for a "determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an agent or officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia . . .". In this instance the factual finding at issue is the state court's finding that Portas' recantation testimony was incredible and "untrustworthy". Determinations of credibility by a state court qualify as the type of "factual issue" to which the presumption of correctness generally attachs (sic). "Issues of fact", as used in 28 U.S.C. § 2254 (d), are "basic, primary, or historical facts: 'facts in the sense of a recital of external events and the credibility of their narrators' ". *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506 (1953)).

Being required to extend the state court's credibility finding a "high measure of deference", *Sumner v. Mata*, 449 U.S. 539 (1981), this court is necessarily precluded from substituting its own finding of Portas' credibility for the contrary finding reached by the state court. As the collateral facts relevant to petitioner's due process claim —whether or not Portas was able to identify petitioner's photo on April 15, 1977 and whether or not he had an independent recollection of the petitioner at the time of the in-court identification—require a threshold finding that Portas' recantation is credible, this court may not reach the merits of these issues unless it can overcome the presumption of correctness afforded the state court's credibility determination. In other words, petitioner's constitutional claim rests upon a determination that Portas

identified someone other than Landano on April 15, 1977 and that this information was suppressed by the state, as was information concerning the bathroom coaching. The prerequisite to rendering such a determination is a belief in the credibility of Portas' October 1982 testimony. If Portas' testimony as to these events is not credible, then there is no factual basis to support the constitutional claim. Therefore, if bound by the state court's credibility finding, this court lacks the authority to reach the constitutional issues framed in petitioner's application.[9]

The case law makes clear that a federal court in a habeas corpus proceeding may overcome the presumption of correctness only if one of the enumerated exceptions is applicable. *See* 28 U.S.C. § 2254(d)(1)-(8). Upon exhaustive consideration, this court is compelled to conclude that none of the deficiencies enumerated provides cause to set aside the state court's findings: (1) The state court

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[9] In petitioner's Sur Reply Brief, he argues that "[n]o state the constitutional implications of the prosecutorial coaching that Raymond Portas received in the course of his photographic and in-court identification of the petitioner". Sur Reply Brief on Behalf of Petitioner at 8. It is beyond dispute that neither Judge Hanrahan nor the reviewing state appellate court reached the merits of petitioner's constitutional claims. However, this does not lead to the conclusion that this court is free, as a matter of law, to now resolve these constitutional questions.

The state court never reached the merits of these claims because it determined as a threshold factual matter that Portas' recantation testimony was "untrustworthy" and incredible. Such a finding obviated the need to conduct further legal analysis by essentially dismissing the factual basis upon which the constitutional claims were predicated. For this reason, if bound by the state court's credibility finding, this court is similarly precluded from reaching the merits of petitioner's claim with respect to Portas' identification testimony.

did resolve the issue of whether Portas' testimony was believable as required under the standard for evaluating recantation testimony. (2) The factfinding procedure employed by the state court, though perhaps too lenient in permitting the rosecutor's abrasive treatment of the witness, was "adequate to afford a full and fair hearing". (3) A review of the proceeding reveals that Portas was able to fully develop his testimony with the assistance of petitioner's counsel and that the state court had all the relevant information concerning Portas' recantation before it at the time it rendered its decision. Moreover, the court had the opportunity to observe Mr. Portas on two separate occasions providing adequate basis for a credibility determination. (4) The court properly exercised jurisdiction over petitioner's post-conviction application for a new trial. (5) Petitioner's rights were adequately protected by the presence of his counsel was free to conduct the direct examination of Mr. Portas, as well as proffer objections where appropriate. (6) Again, despite the court's own misgivings concerning the state's treatment of Mr. Portas, the number of times he was reminded that he had previously testified under oath, and the implicit threats of perjury charges, the court cannot conclude that petitioner's application did not receive a full, fair and adequate hearing. The case law illustrates that generally a federal court will set aside a state court finding on this basis only if the state court proceeding suffered from some gross procedural deficiency. *See Moore v. Kemp,* 809 F.2d 702 (11th Cir.1987); *Davis v. Wyrick,* 766 F.2d 1197 (8th Cir. 1985); *Griffin v. Wainwright,* 760 f.2d 1505 (11th Cir. 1985). Where, as here, the applicant was represented by competent counsel, and was given unrestricted opportunity

to examine the witness both on direct and re-direct examination as well as to object to cross-examination, this court would be acting outside the proper scope of the statute if it were to set aside the state court hearing on procedural due process grounds. (7) The applicant was not denied due process as a result of the state court proceeding.

Finally, (8) though this court may reach a different conclusion than did the state court, there is no legal basis for this court to hold that the state court's decision was not "fairly supported by the record". Particularly, where as here, the underlying "fact" is the determination of a witness' credibility, it would be impossible for this court to find, as a matter of law, that the court's subjective impression of the witness' demeanor, sincerity, manner of expression were not "fairly supported by the record". Furthermore, in light of the fact that Portas' testimony was contradicted in the record by that of Detective Xavier who testified that no photo other than petitioner's was selected from the S-2 array, the state court was entitled to weigh these competing recitations and choose between them. Though the opinion does not make this credibility choice explicit, it may be inferred that in disbelieving Portas, the court chose to believe Detective Xavier. Cf *Marshall v. Lonberger,* 459 U.S. 422 (1981).

The statute provides one additional alternative to the district court. 28 U.S.C. § 2254(d) permits a federal court to conduct an evidentiary hearing in a habeas proceeding even absent the existence of one of the enumerated exceptions but requires that "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous". The bur-

den here placed upon petitioner is virtually insurmountable. The only evidence that could be presented to this court is the production of Raymond Portas himself. However, even having heard Portas' testimony and having found him to be credible, this court cannot conclude that the state court's contrary determination was erroneous. As stated previously, it is difficult to imagine the grounds upon which a credibility determination can ever be considered "erroneous". The subjective judgment implicated in a credibility determination is practically immune from the traditional "error" analysis. "Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly errouneous". *Anderson v. Bessemer City,* 470 U.S. 564, 574 (1985).

Moreover, the fact that a federal court would rule differently on the question of a witness' credibility is not sufficient to render the state court finding "erroneous". The Supreme Court has ruled that the high measure of deference that must be accorded adequately supported state court factual findings "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations". *Marshall v. Lonberger,* 459 U.S. at 432.

Similarly, in the context of Federal Rule of Civil Procedure 52(a), the Supreme Court has held that a federal appellate court, reviewing the findings of a district court pursuant to a "clearly erroneous" standard of review, is not entitled to "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently". *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985). "A reviewing court oversteps the bounds of

its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court". *Id.* In interpreting the Congressional intent underlying 28 U.S.C. § 2254, the Supreme Court has explained "[w]e greatly doubt that Congress . . . intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself". *Marshall v. Lonberger*, 459 U.S. at 435.

Doctrines of comity and federalism constrain this court's ability to set aside the state court's finding. This court recognizes that 28 U.S.C. § 2254 does not permit a federal court to simply circumvent the presumption of correctness by holding an independent hearing and duplicatting the state court's proceeding. To tolerate such judicial manipulation would make a mockery of the legislative policy underlying 28 U.S.C. § 2254. Although this court concluded that there was an appropriate basis to conduct a hearing for the reasons expressed above, judicial restraint requires this court to accord deference to the state court's findings.

Where the recantation testimony of a critical prosecution witness, if believed, raises substantial issues of constitutional import, requiring a federal court tto be bound by the state court judge's credibility determination in every instance may undermine the petitioner's right to meaningful habeas review. The presumption of correctness embodied in Title 28 U.S.C. § 2254(d) operates to insulate a state court judge's credibility finding from subsequent federal analysis. Where, as here, the petitioner's most significant constitutional allegations are based on Portas' recantation testimony, the federal court should be able to conduct an independent hearing and substitute its credibility find-

ing for that of the state court when the particular circumstances warrant. These circumstances are rare and will not result in gross deviations from the traditions of comity since such independent hearings would only be permitted where the federal court determined that the witness in question played a critical role in securing petitioner's conviction. The recantation of cumulative evidence, where, for example, one of several eyewitnesses recants his or her identification, would not warrant an independent federal hearing. Further, a federal hearing would only be necessary where the recantation testimony, if believed, raises substantial questions of constitutional import.

Based on this court's independent hearing, if permitted to rely on its own finding of Portas' credibility the court would apply the federal standard for evaluating recantation testimony. In federal court, the impact of recanted testimony as a basis for a new trial motion depends both upon the credibility of the recanting witness and the materiality of his testimony. *See Mastrian v. McManus,* 554 F.2d 813, 823 (1977). This court finds Portas credible. Further the court finds that Portas in-court identification should have been excluded on the grounds that the detective's coaching was unduly suggestive and infected Portas' ability to give accurate identification testimony; and that Portas had no independent basis for the in-court identification. In addition, if the jury was made aware that Portas had not been able to identify Landano's photo from the array of dark-haired perpetrators, this court is convinced that "the recanted testimony would probably produce an acquittal or retrial". *Id.* at 823.

It is for these reasons that the court believes an injustice results in requiring this court to abdicate its own fact finding authority and turn a deaf ear to petitioner's

constitutional claims in deference to the state court's finding that Portas is an incredible witness. Yet, as a district court, this court is sworn to abide by the dictates of existing law and may not deliberately bypass explicit Congressional intent in substituting its judgment for that of the state court. It is for this reason though that the court urges the federal appellate court to reconsider the application of 28 U.S.C. § 2254 in similar circumstances. This court has made every effort to elucidate upon the course it would have followed, if it were free to render its own fact finding. However; the ultimate authority to create a limited judicial exception to the application of § 2254 rests, if at all, with the court of appeals and not with this court.

For the reasons stated above, this court is compelled to deny petitioner's application for a writ of habeas corpus on this ground.

II. *Allen Roller*

As a further ground for relief, petitioner alleges that the state violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing exculpatory and material evidence that would have impeached Alan Roller, the state's principal witness against the petitioner.

In *Brady v. Maryland*, the Supreme Court held that a defendant's due process right to a fair trial is violated when the prosecution withholds evidence that is both favorable to the accused and "material either to guilt or punishment" 373 U.S. 83, 87 (1963). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confi-

dence in the outcome. *United States v. Bagley,* 473 U.S. 667, 682 (1985). Thus, under *Brady,* a prosecutor is required to disclose only that evidence favorable to the accused which, if suppressed, would deprive the defendant of a fair trial. *Carter v. Rafferty,* No. 85-5735, slip. op. at 12 (3d Cir. August 21, 1987). "[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." *United States v. Agurs,* 427 U.S. 97, 108 (1976).

The *Brady* rule has been extended to include impeachment evidence as well as exculpatory evidence. *See Giglio v. United States,* 405 U.S. 150, 154 (1972). "Such evidence is 'evidence favorable to an accused' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley,* 473 U.S. 667, 676 (1985). *Cf. Napue v. Illinois,* 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying that a defendant's life or liberty may depend").

At trial, Allan Roller, provided the state's principal evidence against the petitioner. Roller, an indicted co-defendant, admitted his participation in the crime and alleged that Landano had been his partner. *See* Trial Transcript for May 2, 1977, at 15. Further, Roller testified that Landano had admitted to having murdered Officer Snow.

Roller testified at trial pursuant to a plea agreement entered into with the Hudson County Prosecutor's office.

When questioned at trial concerning the terms of the plea agreement, Roller disclosed only that he had pled *non vult* to the charge of homicide and felony murder of Officer Snow in exchange for dismissal of all other counts of the indictment and a promised maximum sentence not to exceed thirty years. *See* Trial Transcript for May 2, 1977 at 91. Roller also stated that the Prosecutor had agreed to dismiss "another indictment, another charge of armed robbery" pending against him involving "Mike's Bar" in Jersey City, May 2, 1977 Transcript, at 91-92.[10] Roller alluded to no other pending charge.

In addition, Roller testified as to his criminal association with Victor Forni. Roller admitted that Forni had been involved in planning the Kearney robbery, and in fact, that Forni's gun had been used to kill Officer Snow. However, Roller denied that Forni played any role in the robbery itself. Similarly, Roller denied that he participated with Forni in other crimes.

Subsequent to the trial, evidence was disclosed implicating Allen Roller in armed robberies of the Perth Amboy Coin Exchange on September 26, 1975 and January 23, 1976 prior to trial. This evidence was made the subject of a new trial motion and remanded to the trial court for consideration. Hearings were held upon remand, and

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[10] When cross-examined as to the details of the "Mike's Bar" incident, Roller initially admitted that there were "three holdup men in that crime", but when asked to disclose the identities of his two co-defendants Roller refused to reveal one of their identities. *See* Trial Transcript of May 4, 1977, at 16-17. When charged by the court to respond to the question, Roller changed his testimony and maintained that only two men had been involved in the Jersey City holdup. The jury was able to infer that Roller was protecting someone.

the state court rendered the followings findings: (1) On August 27, 1976, a witness to the Perth Amboy crimes, Mr. Stepniak, was presented with photographs of suspects. Stepniak tentatively identified Roller, Forni and Reen as the probable perpetrators of the first robbery, but he expressed some uncertainty. Detective Manuel Cruz also identified Allan Roller as one of the persons he observed outside the coin shop immediately prior to the first robbery. (2) Detective Cruz contacted the Hudson County Prosecutor's office to arrange a line-up for witness Stepniak. As the result of ongoing extradition proceedings against Forni and Reen, a line up was postponed indefinitely. However, Detective Cruz recalls that Lieutenant Farley of the Hudson County Office, responsible for overseeing the Kearny investigation, requested that Cruz not publicize the Perth Amboy investigation "in order not to jeopardize any potential plea bargain". December 1, 1978 Opinion of Judge Walsh, Appendix, Volume 1, at 33A. (3) Though Thomas Mulcahy, the assistant prosecutor presenting the state's case against Landano, denied any knowledge of the Perth Amboy investigation, the state court found that Lieutenant Farley's knowledge could be imputed to the prosecutor. *See Giglio v. United States*, 405 U.S. 150 (1972).

Reviewing these facts, the state court determined that the information concerning Roller's participation in the Perth Amboy robberies was properly "exculpatory" evidence within the meaning of *Brady*. Walsh Opinion at 36A. Specifically, the court held that the suppressed evidence, if allowed at trial "would have been probative in demonstrating, if Rolled denied Forni's participation in Perth Amboy, that Roller was protecting Forni". *Id.*

Further, the state court found that the evidence would serve to impeach Roller "by tending to show Roller's interest in testifying favorably "in order to minimize the potential consequences of a prosecution for these crimes". *Id* at 37A.

Having made these findings however, the state court concluded that the withheld evidence was not "material", namely that there was not a reasonable probability that had the suppressed evidence been disclosed, the outcome of the trial would have been different. The Third Circuit has recently ruled that "the materiality of evidence under Brady is a mixed question of law and fact and that state court determinations of the law portions of this mixture are not entitled to a presumption of correctness under Section 2254(d)". *Carter v. Rafferty* No. 85-5735, slip. op. at 16 (3d Cir. August 21, 1987). Accordingly this court need not defer to the state court's legal conclusion that the suppressed evidence is not material but rather must undertake an independent legal analysis.

In order to determine the "materiality" of this evidence the court must consider the strength or fragility of the state's case against [Landano] as a whole". *Id.* at 20. As noted by the Supreme Court in *United States v. Agurs*, [i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of minor importance might be sufficient . . ." 427 U.S. 97, 112-13 (1976).

At the outset, the court notes that had the suppressed information merely provided evidence of Roller's addi-

tional criminal activities, such evidence alone would not be sufficient to undermine confidence in the outcome of the trial. First, Roller's criminal record was already disclosed to the jury such that evidence of additional criminal activity would not serve to seriously impugn Roller's testimony. Second, while evidence that Roller had lied as to the extent of his criminal activities would certainly impeach Roller's credibility, such cumulative evidence standing alone would not suggest a motive for Roller's identification of Landano, nor would it establish additional bias or interest on Roller's part. Roller's interest in testifying favorably was previously established in the record through testimony regarding his guilty plea agreement.

However, the information establishing a criminal partnership between Roller and Forni, evidenced by their joint participation in the Perth Amboy robberies, gives the court greater pause. Though recognizing that the only evidence linking Forni to the Perth Amboy crime was Stepniak's tentative photo identification, the court believes that had defense counsel had the opportunity to present the jury with such evidence, counsel might have convinced the jury that Roller and Forni operated as a team.

The Perth Amboy robbery was similar in kind to the Kearny robbery. Evidence that Forni and Roller were partners in this criminal venture would have permitted counsel an opportunity to effectively argue that they were partners in the Kearney incident as well. It is undisputed that the gun used to kill Officer Snow was Forni's and that Forni was involved in the planning stage of the Kearny robbery. Moreover, the description of the dark

haired perpetrator offered by eyewitness Joseph Pasciutti closely matched Forni's physical appearance.

At trial Roller denied having participated in criminal activity with Forni. Presentation of the Perth Amboy evidence would challenge Roller's credibility on this issue and create a powerful suggestion that Roller was lying to protect Forni.

If this additional evidence were considered absent Raymond Portas' independent identification of Landano as the driver of the getaway car, the court would unhesitatingly find that the information concerning the Perth Amboy robberies was material. However, considering the additional information in light of Portas' photographic and in-court identification of the petitioner, the court cannot conclude that there is a reasonable probability that the outcome would have been different. In light of the other evidence, this court is compelled to conclude that petitioner was not denied a fair trial as a result of the state's suppression of the evidence concerning the Perth Amboy robberies.

III. *The Investigation of Jacob Roth*

As a further basis for relief, petitioner asserts that the state of New Jersey violated the requirements of *Brady v. Maryland,* by failing to disclose information concerning an investigation into the potential "loan sharking" and money laundering activities of the Roth check cashing facility, its suspected connections to "underworld" figures and the possibility of illegal payment of gratuities to the decedent, Officer John Snow. Petitioner argues that such information might have been used to impeach

Jacob Roth's testimony by showing bias or interest. *See* Petitioner at 45.

On July 21, 1981, assistant prosecutor Thomas Mulcahy, responsible for having presented the state's case against petitioner four years earlier, addressed an audience at Kean College on the topic of the Landano trial. *See* Transcript of Mulcahy Lecture, Exhibit A attached to May 27, 1986 Mullin Affidavit. His remarks revealed for the first time that during the pendency of the criminal investigation resulting in petitioner's indictment and trial, a simultaneous investigation was being conducted into the business dealings of Jacob Roth, victim of the Kearny robbery, and one of two witnesses who positively identified petitioner as the dark-haired perpetrator. Mr. Mulcahy's presentation disclosed that the Hudson County Prosecutor's Office had "looked hard" into the Roth check cashing operation suspecting that "these kinds of check cashing operations many times have contacts with the underworld in a sense that they are very convenient since there is so much money being transferred—it's a very convenient place to have a loan sharking operation of . . . a sort. *See* Exhibit A at 233a. Particular suspicion had been aroused with regard to the Roth facility because Roth "also happened to have a place in Elizabeth that he had sold", which Mulcahy believed was a joint venture affiliating Roth with a notorious Bayonne "loan shark" identified as Gallagher. *See* Exhibit A at 233a; *see also* Israel Affidavit, ¶ 12 attached to Petition as Exhibit C; *see generally* Lotwis Affidavit, attached to Petition as Exhibit D.

Mulcahy's remarks fairly support an inference that Roth was aware of the ongoing investigation into his

business dealings. Mulcahy explained that Roth was subjected to "numerous interviews" throughout the investigation, Exhibit A at 235a, and that these interviews probed not only Roth's "underworld" connections but also possible improprieties in his relationship with the murdered officer, John Snow. Specifically Mulcahy recalled that "throughout the investigation and in numerous interviews, we [the Hudson County Prosecutor's Office] asked Mr. Roth whether he ever gave any moneys as a gratuity to Mr.—Police Officer Snow who was killed. . . . They never admitted to us that there was ever any monies exchanged, although I always suspected there was". Exhibit A at 235a.

Perhaps most significantly, Mulcahy disclosed for the first time during this presentation that Jacob Roth "was a somewhat uncooperative guy who never wanted to be—didn't want to be bothered". Exhibit A at 288a. According to Mulcahy, Roth "just didn't want to be involved and we had to like coerce him—tell him—you're involved—this is your place—it got ripped off." *Id.*

The significance of Mulcahy's post-trial disclosure may best be understood in context. At trial, Jacob Roth, victim of the Kearny robbery took the stand and offered testimony against the petitioner. Though Roth's recollection of the events contradicted those of Roller and of his son Jonathan Roth, Jacob Roth testified that petitioner and not Roller had approached the check cashing facility on the day of the crime. Roth rendered an in-court identification of petitioner and testified that prior to his court appearance he had twice "positively" identified petitioner's photo when shown a photographic array. Con-

trary to Roth's testimony, Detectives Zarnowski, Thompson and Hanson described Roth's initial photo identification on August 26, 1976 as "tentative", but that Roth had been able to positively identify the petitioner from photo array S-2 on August 31, 1976. Roth maintained that each of the two identifications had been "positive". *See* Trial Transcript, April 27, 1977, at 21.

When petitioner took the stand at trial the prosecutor inquired of him: "is there any reason you know of that Mr. Roth would have come in here and point you out as the man he saw from his window on August 13?". *See* Trial Transcript, May 10, 1977 at 81-82. Petitioner could offer no explanation.

Finally, the prosecutor's summation emphasized to the jury that "throughout this case there is no suggestion of police malpractice or coercion on these [photographic] selections." *See* Trial Transcript, May 11, 1977, at 95-96.

Petitioner now comes before this court arguing that the information concerning the state's investigation of Roth, previously suppressed, is both exculpatory and material under the rule in *Brady* and provides a sufficient basis for vacating petitioner's conviction. Petitioner argues that the mere fact of the investigation is sufficient to establish bias and therefore qualifies as exculpatory evidence. Relying on the court's reasoning in *State v. Mazur* 158 N.J. Super. 89 (App. Div. 1978), *cert. den.* 78 N.J. 399 (1978), petitioner asserts that even though no formal charges were pressed against Roth, the investigation's coercive effect was substantial in light of a New Jersey statute which provides that the state may refuse to renew a check cashier's license if he is "associating

or consorting with any person who had, or persons who have, been convicted of a crime or crimes in any jurisdiction". *N.J.S.A.* 17:15A-12. Arguing that the investigation was "livelihood threatening" and had a bearing on Roth's future licensing, petitioner urges this court to conclude that had the jury known of the investigation they could have inferred that Roth had an interest in accomodating the prosecution and further could have ascribed a motive to Roth's willingness to mischaracterize his tentative identification of Landano as "positive".

This court is inclined to agree that the information concerning Mulcahy's investigation into Roth's business dealings is exculpatory and if used effectively might have so undermined the jury's assessment of Roth's credibility as to alter their deliberative consideration of his identification testimony. Through the contradictions between Roth's testimony and that of other witnesses were readily apparent to the jury at trial, disclosure of this information would have provided the jury with a possible explanation for Roth's deviation. The court finds the state's contention that counsel for petitioner was free to cross-examine Roth "on any subject, including any possible organized crime connections to his check cashing operation" both insincere and implausible. *See* State's Brief in Opposition at 23. The state's knowing suppression of its investigation cannot be excused by asserting that counsel for petitioner might have been able to "fish" out some possible interest or bias on Roth's part through cross-examination.

Moreover, the court rejects the state's argument that Mulcahy's July 1981 comments are not a proper basis for

establishing the existence of a contemporaneous investigation of Roth's business dealings. The court finds no basis in law or reason to support the state suggestion that petitioner bears the burden for providing affidavits from Mulcahy and Roth to substantiate the veracity of Mulcahy's comments. *See* State's Reply Brief at 5. On the contrary, petitioner is entitled to rely on information provided by the state prosecutor and the burden falls to the state to convince the court that these comments are not accurate. Finding that the state has made no effort to submit an affidavit by Mr. Mulcahy denying the details of the Roth investigation the court finds that the state impliedly admits the authenticity and veracity of the Mulcahy comments.

What remains however is for this court to determine whether evidence regarding the Roth investigation satisfies the *Brady* materiality standard. In rendering its decision the court must take into account that Roth was the only state witness present at the crime scene who was able to "positively" identify Landano. In addition, the court recognizes that the jury struggled with this action and in fact, appeared deadlocked after two days of deliberation.

Yet, upon review of the record, this court is compelled to conclude that even were the jury to discredit Roth's testimony in its entirety, there is no reasonable probability that the outcome of the trial would have been different. The court bases its decision on the following factors: The strongest evidence presented against the petitioner at trial was the testimony of co-defendant Allen Roller. Roller's trial testimony contradicted Roth's testimony with respect to petitioner's role in the commission of the crime. As

Roller's testimony was confirmed both by the description of eyewitness Pasciutti, who testified that the dark-haired perpetrator did not approach the check cashing facility but rather approached Officer Snow's vehicle, and by the testimony of Raymond Portas who was able to affirmatively identify petitioner as the driver of the getaway car, the court must conclude that the jury was persuaded by this testimony and relied on it in reaching their verdict of conviction. The subtraction of Roth's testimony does not detract from the weight of this evidence. It is for this reason that the court concludes that exclusion of this evidence would create a sufficient probability of acquittal.

IV. The *Allen* Charge

As the final ground for relief petitioner alleges that the trial court improperly interferred with the jury's prerogative to return no verdict by issuing a "coercive" *Allen* charge in violation of petitioner's Sixth Amendment and due process rights.

In *Allen v United States*, 164 U.S. 492 (1896), the Supreme Court sanctioned use of a supplemental jury charge instructing a deadlocked jury to resume deliberations with "a proper regard and deference to the opinions of each other" and to "listen, with a disposition to be convinced, to each other's arguments", and thus "to decide the case if they could conscientiously do so". *Id.* at 501. While the Supreme Court's holding in *Allen* remains the controlling law, use of the *Allen* charge has been severely criticized.

In 1980, the New Jersey Supreme Court in *State v Czachor*, 82 N.J. 392, exercised its supervisory power to hold that use of "a charge containing coercive features

should not be given to a jury in the trial of a criminal case." 82 N.J. at 402. The court reasoned that the "*Allen* charge conveys both blunt and subtle pressure upon the jury, pressure which is inconsistent with jury freedom and responsibility". *Id. Czachor* was given limited retroactive effect, and the Appellate Division upon review of petitioner's post-conviction relief application determined that petitioner's action was properly within the scope of *Czachor's* limited retroactivity. *See* Opinion of the Appellate Division, January 30, 1984, Appendix, Volume 1 at 240A.

However, the *Czachor* court made clear that "[t]here will undoubtedly be some appeals coming within the rule of limited retroactivity in which all or the most objectionable characteristics of the typical *Allen* charge will not be present. In such instances, it would be appropriate for the appellate court to review the surrounding circumstances in order to decide whether there was sufficient potential for coercion to justify reversal". 82 N.J. at 410.

The Third Circuit in *United States v Fioravanti,* 412 F.2d 407 (3d Cir. 1969) *cert denied* 396 U.S. 837 (1969), provides the appropriate standard. *Fioravanti,* like *Czachor,* condemned the *Allen* charge as an unwarranted judicial invasion of the exclusive province of the jury. The court reasoned that "[t]he possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. And although dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of law that a trial judge may not coerce a jury to the extent of

(2) the judge instructed the court that "this case at a future time must be decided" and that "[t]here's no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it; or that more or clearer evidence will ever be produced on one side or the other".

While the court agrees that it was unnecessary, and in fact, inaccurate to instruct the jury that this case "must be decided", when considered in context, this court cannot find that the instruction was so coercive as to have deprived petitioner of a fair trial and the right to a unanimous jury.

In the course of its instruction, the trial court made clear to the jurors that they had "a duty to reach a verdict", but then immediately added "if that's possible". The court was careful to explain that it had "neither the power nor the desire to compel an agreement upon a verdict". In asking the jurors to resume their deliberations, the court emphasized "the importance and desirability of reaching a verdict, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions".

Read as a whole, the instruction is a forceful effort to encourage further deliberation. Nevertheless, it does not request the minority to succumb to the majority viewpoint, nor does it ask that individual uncertainty be sacrificed to acheive unanimity. In fact, the trial judge was careful to remind the jurors that it would, and could not compel a verdict and that no individual should surrender his or her own scruples. By admitting that it lacked the

power to compel an agreement upon a verdict, the court conveyed to the jury a definite impression that it was *not* demanding a verdict.

Other courts have ruled that an instruction informing a jury that a case "must be decided" violated the Sixth Amendment by denying the jury's preprogative to return no verdict. However, in this case, the offending charge that this case must be decided followed a thorough and careful explanation by the court that it might not be possible to reach a verdict, that the court lacked the power to compel a verdict and that no individual juror was required to sacrifice his or her beliefs in order to reach agreement. Considered in this context, the language was not sufficiently forceful to "coerce" the verdict, nor did it mislead the jury into believing that they could not return no verdict. As the questionable language was tempered by an appropriate, albeit forceful invitation to undertake further diligent deliberative efforts, the court finds that the trial court did not violate petitioner's Sixth Amendmsnt right in delivering this instruction.

CONCLUSION

The failure to grant the writ predicated upon the Portas recantation infects the remaining grounds as well. The conviction would clearly fall but for the resurrection of Portas' trial identification testimony. Without it, even the other grounds would provide independent bases for relief and certainly in the aggregate, they would be sufficient to undermine confidence in the trial's outcome.

No decision of this court has ever been made with greater reluctance. In the current debate over judicial

restraint and judicial activism, one tends to forget that individuals as well as concepts and principles are involved. Upholding deference to state factual findings in this matter is a bitter exercise of judicial restraint, since it may result in a gross injustice.

The writ is denied. There is probable and significant cause to appeal.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: September 29, 1987

Original to Clerk, U.S. District Court

Copies to: Mr. Neil Mullin, Esq.
Smith, Mullin & Kiernan, P.C.
100 Executive Drive
West Orange, New Jersey 07052
Attorney for Petitioner

Ms. Leslie Schwartz, Esq.
Deputy Attorney General
Appellate Division
Office of the Attorney General
Hughes Justice Complex

P.O. Box CN 086
Trenton, New Jersey 08625
Attorney for Respondents

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, vs. JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, Respondents.	)	Civil Action No. 85-4777 ORDER (Filed Sept. 29, 1987)

This matter having been opened to the court upon the application of petitioner, Vincent James Landano, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and this court having heard oral argument and having considered the written submissions of all parties, and for the reasons set forth in the accompanying opinion filed this day.

IT IS this 29 day of September, 1987 hereby

ORDERED that petitioner's application for a writ of habeas corpus is denied; however, it is further

DETERMINED that there is probable and significant cause for appeal.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO,	)	Civ. No. 85-4777
	)	
Petitioner,	)	OPINION
	)	
v.	)	(Filed
	)	Dec. 22, 1987)
JOHN J. RAFFERTY, et al.,	)	
	)	
Respondents.	)	

On September 29, 1987, this court denied petitioner Vincent James Landano's application for a writ of habeas corpus. *Landano v. Rafferty,* 670 F.Supp. 570 (D.N.J. 1987). While expressing its "fears that a great injustice has occurred," 670 F.Supp. at 572, and "candidly admit-[ting] an exhaustive search for grounds to grant the writ," *id.,* the court perceived that its "obligation . . . to defer to the factual findings of the state court [made] it impossible to grant the relief sought." *Id.*

Petitioner has now moved for reconsideration of the September 29 opinion and order. The court has thoroughly reexamined this matter and concludes that it must deny the petitioner's motion for reconsideration, reiterating the same misgivings expressed in the court's earlier opinion.

BACKGROUND

There is no need for a recounting of the facts which led up to petitioner's conviction in May of 1977 on various charges arising out of the murder of a Newark police officer. Those facts, together with descriptions of the

evidence presented at petitioner's trial and at the post-trial recantation hearing, and the arguments presented to this court on habeas review, are set out in full in the court's September 29 opinion. 670 F.Supp. at 572-80, 584-85, 586-87. The court therefore mentions only those facts and arguments which are germane to the motion for reconsideration.

On September 1, 1982, petitioner moved before the state court for an order permitting discovery in preparation for the recantation hearing of Raymond Portas. Specifically, petitioner moved for disclosure and inspection of, among other things,

> (i) all files and documents that might contain reference to police or prosecutorial interviews of . . . Raymond Portas undertaken during the investigation of the murder of Police Officer John Snow; (ii) all photographic displays shown Raymond Portas during the aforesaid investigation; (iii) all diaries, logs, or memoranda reflecting or recording Raymond Portas' visit to the Hudson County Prosecutor's office on or about April 15, 1977.

In a short letter, the state court denied petitioner's discovery request on September 27, 1982.

On April 13, 1987, this court entered an order granting petitioner discovery of "all files maintained in the matter of *State v Vincent Landano* by the office of the Attorney General of the State of New Jersey and the office of the Hudson County Prosecutor," as well as all documents concerning the photographic identification procedures used by investigators with Raymond Portas on April 15, 1977. That discovery produced the following new evidence: (1) a "Property and Evidence Report" in-

dicating that two photographs of Victor Forni and several photo arrays were removed from the prosecutor's vault on April 15, 1987, the same day that Portas was asked to choose the driver of the getaway car from a photo array; (2) a manila folder in the Landano file that contained a photo display including Forni's picture but not Landano's; and (3) a statement by Michael D'Andrea, an investigator from the prosecutor's office who had not worked on the original investigation of the Landano case, that the manila folder had been shown to "a truck driver" during the Landano investigation.[1] The state also disclosed a new piece of evidence: it claimed that two photos, until then inexplicably missing from the S-2 photo display which was shown to Portas on April 15, 1977, had been discovered in the S-1 display. Neither of the two photos was of Forni or Landano.

In essence petitioner now contends that this evidence, all corroborative of the credibility of Portas' recantation, was unavailable to the petitioner in the state court recantation proceeding and was thus not considered by the state court in deciding petitioner's application for a new trial. As a result, petitioner contends that this court should disregard the state court's factual findings and rely instead on its own finding that Portas' recantation is credible.

DISCUSSION

A. *28 U.S.C. § 2254(d)*

When a district court exercises its discretion to hold a hearing on a state prisoner's habeas corpus application,

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[1] Raymond Portas was, at the time of the crime and the investigation, a truck driver.

28 U.S.C. § 2254(d) dictates the burdens of proof at its hearing. Under that statute,

> a determination after hearing on the merits of a factual issue, made by a State court . . . , shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit— . . . (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; . . . (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding. . . .

28 U.S.C. §§ 2254 (d)(2), (3), and (6). Petitioner argues that the state judge's denial of his motion for discovery concerning Portas, the prosecutor's suppression of the evidence later uncovered through this court's discovery order, and the prosecutor's "harrassment and intimidation" of Portas at the recantation hearing, 670 F.2d at 758, worked together to deprive petitioner of a "full and fair" hearing conducive to the "adequate development" of "material facts."

That position would be justified if the court could conclude that the evidence presented to it—and not presented to the state court—was material, crucial, or critical, such that if it had been presented to the state court judge, it was likely to have affected his decision or the fullness and fairness of the state court hearing. Before this court may reject the findings of the state court and substitute its own, it must be satisfied that the petitioner was prejudiced in some way by the failure to have such evidence available. This court can make no such finding here.

The fact that the "Property and Evidence Report," indicating that two photographs of Forni were taken from the prosecutors vault on April 15, 1977, might support an inference that Portas saw those photographs on that day. However, this inference is probably negated by the fact that the two photos missing from the S-2 display have been located in S-1 and neither is of Forni. Moreover, there is no other evidence that Portas saw or identified any photograph of Forni. Therefore, the court cannot say that the report itself was "material" under *Brady v Maryland*, 373 U.S. 83 (1963),[2] or that the absence of the report prevented the hearing from being "full and fair" or "adequate" for the development of the credibility of Portas' recantation. The judge at the state hearing had ample opportunity to observe the witnesses, and to hear them fully examined and cross-examined. In light of all of the other evidence before the state judge, this court simply cannot conclude that this report would have made a sufficient difference to satisfy either *Brady* or § 2254(d).

Similarly, the court believes that the hearsay evidence of Investigator D'Andrea was not sufficiently material to allow this court to ignore the state court finding. D'Andrea, who was not involved in the Landano investigation, stated that a manila folder in the Landano file, which contained a photo array including a photograph of Forni, was shown to "a truck driver" during the investigation. This evidence is not material for two reasons. First, there is no evidence that Portas selected a photo from this

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[2] Under *Brady*, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S. v. Agurs*, 427 U.S. 97, 104 (1976).

array. More importantly, however, the evidence is very weak hearsay, and therefore not sufficiently reliable to support a different outcome than the one reached by the state court.[3]

Finally, the fact that the two photographs missing from photo array S-2 have apparently been found in photo array S-1 does nothing more than establish the *location* of the missing photographs. The fact that they were missing was before the state court. Their discovery is therefore not likely to have caused the state court to alter its finding as to Portas' credibility.

This court must therefore conclude that it is without authority under 28 U.S.C. § 2254(d) to strip the state court finding of its presumptive correctness. Although petitioner has pointed to some evidence that the state court did not have before it, petitioner has not persuaded the court that that evidence would or was likely to have affected the decision of the state court, or that the absence of that evidence prevented the state hearing from fully, fairly, and adequately developing the credibility of Portas' recantation.

B. *The Court's Power Independent of § 2254(d)*

Petitioner, relying on *Townsend v Sain*, 372 U.S. 293 (1963), argues that the court enjoys plenary power to make and give effect to fact findings without regard to 28 U.S.C. § 2254(d). Petitioner cites a number of authorities for the proposition that the intent of Congress in

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[3] There is also evidence that other truck drivers were interviewed. As such, D'Andrea's hearsay description does not necessarily refer to Portas.

enacting 28 U.S.C. § 2254(d) was not to eviscerate *Townsend*, but to leave it intact and supplement it. *See, e.g., Thomas v Zant*, 697 F.2d 977 (11th Cir. 1983), *cert. denied*, 107 S.Ct. 1982 (1984); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal Courts and the Federal System* 1505 n.7 (2d ed. 1973). From this premise, petitioner concludes that the court, having decided to hold an evidentiary hearing, had the power to give effect to its own findings of fact without first concluding that the state proceeding was defective in one of the ways enumerated in § 2254(d).

Petitioner's premise is accurate, but his conclusion faulty. The *Townsend* Court was quite explicit in its purpose: "The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory." 372 U.S. at 318. In other words, *Townsend* lists the situations in which a federal district court *must* hold an evidentiary hearing on a habeas application. *Townsend* left open the question of when a district court *may* hold an evidentiary hearing in situations other than those in which hearings are mandatory: "In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge." *Townsend*, 372 U.S. at 318. It is the role of 28 U.S.C. § 2254(d) to establish the burden of proof at hearings which are discretionary under *Townsend*.

Therefore, had this court's September 2, 1987 evidentiary hearing been mandatory under *Townsend*, petitioner could argue forcefully that the court would be freed of any obligation of deference to the state court's

findings.[4] This court, however, exercised its discretion in holding that hearing. Therefore, the court had no authority, other than that which is delegated in the eight subdivisions of 28 U.S.C. § 2254(d), to strip the state court findings of their presumption of correctness.

CONCLUSION

The court has carefully reviewed the arguments petitioner has pressed in his motion for reconsideration. Absent a finding that the new evidence presented to this court was material and the failure to present it to the state court was prejudicial, this court continues to conclude that it must heed the Congressional mandate, and in turn, defer to the state court findings.

The court does so with no less anguish on this second occasion.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: December 22, 1987
Original to Clerk, U.S. District Court

Copy to: Neil Mullin, Esq.
Smith, Mullin & Kiernan
100 Executive Drive, Suite 340
West Orange, NJ 07052

Leslie Schwartz, Esq.
Deputy Attorney General
25 Market Street
CN 086
Trenton, NJ 08625-0086

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[4] *See Thomas v. Zant*, 697 F.2d 977, 985 (11th Cir. 1983), ("if *Townsend* indicates sufficient unreliability in the state conclusions so that a new hearing is *required*, it is reasonable to refuse to give weight to the "former conclusions in the new hearing" (emphasis added)), *cert. denied*, 107 S.Ct. 1982 (1984).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner,	)	Civ. No. 85-4777
v.	)	ORDER
JOHN J. RAFFERTY, et al., Respondents.	)	

This matter having been opened to the court upon motion of petitioner, Vincent James Landano, for reconsideration of this court's opinion and order of September 29, 1987, denying petitioner's application for a writ of habeas corpus, and the court having considered the submissions of the parties and heard oral argument, and for the reasons set forth in the accompanying opinion and for good cause shown,

IT IS on this 22nd day of December hereby

ORDERED that petitioner's motion for reconsideration is denied.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

OPINION (STATE COURT -- DECEMBER 3, 1982)

SUPERIOR COURT OF NEW JERSEY

Members Of
H P Hanrahan
Judge

Hudson County Courthouse
Administration Building
Jersey City, N J 07306

December 3, 1982

Morton Stavis & Neil Mullin, Esqs.
86 Hudson Street
Hoboken, New Jersey 07030

John A. Covino, Esq.
Deputy Attorney General
Division of Criminal Justice
Hughes Justice Complex
CN 085 Trial Section
Trenton, New Jersey 08625

Re: State v. Vincent James Landano
Indictment No. 73-76

Dear Counselors:

The defendant was convicted of first degree murder while armed; three counts of armed robbery; breaking and entering; receiving a stolen motor vehicle; unlawful possession of a pistol without a requisite permit; and conspiracy to commit armed robbery and murder. He was sentenced to State Prison for life, together with other consecutive and concurrent sentences. Convictions were sustained in an unpublished opinion of the Appellate Division, decided March 21, 1980. Certif. den. 85 *N.J.* 98 (1980.) He now moves this Court to vacate the judgments of convictions and grant him a new trial on the ground that Raymond Portas, a State's witness has recanted.

"The test for the judge in evaluating a recantation upon a motion for a new trial is whether it casts serious

doubt upon the truth of the testimony given at the trial and *whether,* if believable, the factual recital of *the recantation so seriously impugns the entire trial evidence* as to give rise to the conclusion that there resulted a possible miscarriage of justice. His first duty is, therefore, to determine whether the recanting statement is believable." *State v Puchalski* 45 *N.J.* 97, 107, 108 (1965.) (Emphasis added)

The Court observed Mr. Portas' manner of expression, sincerity, candor, and straightforwardness during the two days he testified before this Court.

The Court received the impression that Mr. Portas feels that he "pressed the button" that condemned Landano. Self appraisal of the importance of his testimony weighed heavily on his conscience. He was so mentally disturbed that he sought the guidance of a priest. Indisputably the pastor consoled, pacified him. Apparently for five years thereafter the Landano case gave Mr. Portas no particular concern until he read an article entitled "The Hard Fall", by Michael Israel appearing in the October 1981 edition of the New Jersey Monthly Magazine. The wretched feeling he experienced after testimony at the trial obviously was rekindled by the article. This is manifest by pertinent segment of his testimony.

Q. You read the article?

A. Yes

Q. At that point you became bothered by what happened?

A. Yes

Q. Because of what?

A. Because in the article it seemed to me that the only thing that convicted him was my saying it was him, number one, and there was no other evidence according to that article that convicted him. (T.66, 1.2-11 10/6/82)

Indeed the article is an extremely powerful piece. It is a biting critique of the law enforcement attitude, prosecutorial excesses when a person is charged with being a cop killer. Paranthetically, the author points out many flaws in the State's case. Suspect is the trial that is devoid of gaps, holes, inconsistencies and contraditions. A defendant is not entitled to a perfect trial, a defendant is entitled to a constitutionally fair trial. An individual who had absolutely no knowledge of the trial or events that precipitated it, could not help but being swayed by its partisan view. It is understandable that the article upset Mr. Portas norwithstanding that to this day he is not sure if he was indeed influenced by it.

A. I started thinking about what the detective had done in the bathroom and wondered if I had been influenced. I really don't think I was. I started to think about the picture, about how I picked out one, and then the other one.

Q. So, your testimony on September 1, 1982, is you really don't think you were influenced?

A. It's very hard to know whether you've been influenced or not, as far ar I'm concerned I don't know. (T.68, 1.6-12 10/6/82)

Mr. Portas speaks of two events, the bathroom scene and the photograph identification procedure employed

by the State in the prosecutor's office. The bathroom incident occurred on the day of the trial but was not revealed until Mr. Portas spoke over the telephone to Mr. Israel. On the day of the trial Mr. Portas sat outside the courtroom waiting to be called as a witness. There were five active criminal courts located on that floor at the time. It is conceivable that a large number of people may have been in that hallway at any given moment. Mr. Portas testified that there were many people moving about yet he noticed two well dressed men walk by him. Why did these two particular gentlemen catch Mr. Portas' eye? This aspect of the testimony troubles the court. As the gentlemen walked by him, Mr. Portas stood up and proceeded to the bathroom. Someone, who he assumed was a detective, followed him into the restroom and said, "you saw the guy going in the courtroom, that's our man." (T34 1.18-19 10/28/82). Actually Mr. Portas did not see these men go into the courtroom. At some point he would tell us the gentlemen said, "did you see these two men," at other times he would say, "did you see that man." Mr. Portas never stated that the gentlemen in the bathroom described or pointed out Landano, now, he tells us that he does not know if this gentleman influenced him in his in-court identification of Landano.

Mr. Michael Israel testified at this hearing as a witness for the defendant. He related the contents of the telephone conversation he had with Mr. Portas. Among other things Mr. Israel stated that Mr. Portas told him that he was "out in the hallway and saw a man in a 3 piece suit walk by. He said 'gee, that looks like him' and his voice then trailed off." (T P. 97 1. 22-24 10/28/82)

The other scene which sticks in Mr. Portas' mind is that which occurred in the prosecutor's office on April 15, 1977. There Mr. Portas without the slightest suggestion from any member of the prosecutor's staff selected Mr. Landano's photograph from one set of photographs and an accomplice's photograph from another set of pictures. After selecting Landano's photograph the defense maintained that a member of the prosecutor's staff blurted out "that's the one we want." The State vehemently denies any such confirming remark was made. No further comment is required because the entire episode was fully developed at trial. It was before the jury to weigh.

On appeal the defendant mounted a Simmons attack[1] claiming a photograph identification had been made in an unduly suggestive manner so as to create a substantial likelihood of misidentification. The Appellate Division rejected this argument finding that "the record discloses no indication whatsoever of any impermissibly suggestive procedure on the part of the law enforcement authorities at the time of the photographic displays.[2]

As I emphasized before the legal standard applicable is whether the recantation impugns the entire trial evidence. Mr. Portas' testimony is not the classic recantation. He does not now say "I lied before", he does not now say "Landano was not the driver of the getaway car." To overcome the theory of the law that

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1 *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 *L.Ed* 2d 1247 (1968):

2 Appellate Division decision decided March 21, 1980 (Page 14)

> Courts generally regard recantation testimony as suspect and untrustworthy. 58 *Am. Jur.*, 2d, *New Trial*, § 175, p. 391. Consequently, the burden of proof rests on those presenting such testimony to establish that it is probably true and the trial testimony probably false. *State v. Baldwin*, 47 *N.J.* 379, 400, *cert. den.*, 385 *U.S.* 980, 87 *S.Ct.* 527, 17 *L.Ed.* 2d 442 (1966).

His power of recall is not the test. The pivotal question is does his testimony today establish that his trial testimony was probably false. The defendant has not met that burden. Further, his hearing testimony does not seriously impugn the entire trial evidence. Mr. Portas believes his testimony standing alone convicted the defendant. This is clearly without merit. As Mr. Israel wrote, Landano "was convicted by a jury after a four week trial . . . by the testimony of four eye-witnesses and an accomplice who admitted his own role; by forensic tests of hairs found in the killer's hat that were similar to his; and by a chain of circumstantial evidence that made coincidence seem impossible."

I believe Mr. Portas' uncertainty at this time is only natural, it has been 6 years since the crime occurred. The Court is satisfied that this explains the many inconsistencies, contradictions and faulty memory. He is a confused and uncertain man. His testimony is untrustworthy and lacks the capacity to cast serious doubt upon the truth of his trial testimony, and does not support an application for a new trial. Motion denied.

Prosecutor should submit an appropriate order.

Very truly yours,

/s/ Joseph P. Hanrahan
Joseph P. Hanrahan

JPH:ifs
cc: Court Clerk